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Editor  
Professor Rodney Smith

**Role of Integrity Agencies**

**Section 44 of the Constitution**

**Parliaments and Their Watchdogs**

**Delegated Legislation and the Democratic Deficit**



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## From the Editor

Rodney Smith

Professor of Australian Politics, University of Sydney

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This is my first issue of the *Australasian Parliamentary Review* as editor. I would like to take the opportunity to thank Professor Colleen Lewis for editing the *Australasian Parliamentary Review* from 2014 to August 2017. She has left her mark on the journal and will be a difficult act to follow.

Partly due to the editorial changeover and partly due to some other factors, this issue of the *Australasian Parliamentary Review* has appeared later than scheduled and is shorter than most recent issues. I apologise for those shortcomings but am confident that this issue of the journal still contains much of current and future interest.

In the first article in this issue, Anne Twomey provides a thorough analysis of the recent Section 44 controversies and High Court cases, from their origins until mid-February 2018. Mel Keenan examines the equivalent issues at state level, focusing particularly on eligibility to sit in the New South Wales Parliament. On a different issue of parliamentary representation, Kelvin Matthews argues that the existing governance arrangements for Christmas Island leave the Island's residents facing a democratic deficit. Alex Hickman explores recent cases in which actions by the Executive in Western Australia have made parliamentary scrutiny more difficult and suggests some remedies. The final two articles explore aspects of the relationship between parliaments and other parts of integrity systems. Chris Aulich and Roger Wettenhall provide an overview of integrity systems before analyzing the importance of independence for integrity agencies. Peter Wilkins focuses more specifically on statutory reviews of Auditors General, using a comparison of four recent reviews to suggest ways in which Australian parliaments might make such reviews more effective, while maintaining the independence of watchdog bodies. David Clune closes the issue with a review of the first volume of John Edward's biography of John Curtin.

I would like to thank the helpful experts who refereed papers for this issue of the *Australasian Parliamentary Review*. All six articles in the current issue were double-blind refereed. The authors found the comments of the referees constructive. When enough people have acted as referees to ensure that their identities cannot be linked to particular papers, I will publish a list of those who have helped the *Australasian Parliamentary Review* in this way.

At its 2017 Meeting, the Australasian Study of Parliament Group Executive agreed to move the *Australasian Parliamentary Review* from its long-standing hard copy format to an on-line only format. This is the first entirely on-line issue of the *Australasian Parliamentary Review*. The basic structure of the journal remains the same. Readers can read articles on screen or download and print them as desired. Apart from its environmental and cost advantages, the online journal format allows for easier article searches, as well as the inclusion of electronic links and graphical material that is difficult to reproduce in a paper-based journal. The change to online production has been led by Lesley Ferguson. I would like to thank her for the skills and hard work she has put into ensuring the transition has been a smooth one.

Finally, an apology arising from the last issue of the journal: in a review of the book *Party Rules? Dilemmas of Political Party Regulation in Australia* (Canberra, ANU Press, 2017), co-edited by Anika Gauja and Marian Sawer, Anika Gauja's name was misspelt several times as 'Gaula'.

# Articles

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## Section 44 of the Constitution – What Have We Learnt and What Problems Do We Still Face?<sup>1</sup>

Anne Twomey

Professor of Constitutional Law, University of Sydney

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In 2017, section 44 of the Commonwealth Constitution came to prominence in Australia. It renders persons ‘incapable of being chosen or of sitting as a senator or a member of the House of Representatives’. It does so on grounds that include holding foreign citizenship, being convicted of an offence punishable by imprisonment for a year or longer, becoming bankrupt, holding an office of profit under the Crown or having a pecuniary interest in any agreement with the public service. If a sitting Member or Senator triggers any of these grounds of disqualification, then section 45 of the Constitution also vacates his or her seat.

At the time of writing, nine putative Senators had been held invalidly elected at the 2016 election, being Robert Day,<sup>2</sup> Rodney Culleton,<sup>3</sup> Scott Ludlam, Larissa Waters, Fiona Nash, Malcolm Roberts,<sup>4</sup> Stephen Parry, Jacqui Lambie<sup>5</sup> and Skye Kakoschke-Moore.<sup>6</sup> The possible disqualification of Senator Katy Gallagher was also referred to the Court of Disputed Returns for determination in 2018.

In the House of Representatives, the Deputy Prime Minister, Barnaby Joyce, was found to have been invalidly elected<sup>7</sup> and John Alexander resigned<sup>8</sup> as a consequence of holding dual citizenship. Both were returned to office in by-elections after renouncing their foreign citizenship. David Feeney also resigned after he found that he could not produce evidence that he had renounced his foreign citizenship,<sup>9</sup> averting the need for a full hearing before the Court of Disputed Returns.

In addition, the filling of the vacated Senate seats was delayed for a variety of reasons. The replacement of Fiona Nash was first delayed because the person next elected on a special count, Hollie Hughes, was also found to be disqualified.<sup>10</sup> There was then a further delay due to a dispute as to whether the person next elected in a special count should fill Nash’s six year

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<sup>1</sup> This is the underlying paper for a Parliamentary Library Lecture, delivered at Parliament House, Canberra, on 30 November 2017, which has been updated to include further developments up to 13 February 2018.

<sup>2</sup> *Re Day [No 2]* [2017] HCA 14.

<sup>3</sup> *Re Culleton [No 2]* [2017] HCA 4.

<sup>4</sup> *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (hereafter ‘*Re Canavan*’).

<sup>5</sup> *Re Parry; Re Lambie; Re Kakoschke-Moore* [2017] HCATrans 254 (8 December 2017) (Nettle J).

<sup>6</sup> *Re Kakoschke-Moore* [2018] HCATrans 2 (24 January 2018) (Nettle J).

<sup>7</sup> *Re Canavan* [2017] HCA 45.

<sup>8</sup> Technically, one cannot resign from an office that one did not hold due to disqualification. But as the effect of the disqualification or resignation of a Member of the House of Representatives is the same—a by-election—there is no necessity for a court finding of disqualification if the Member resigns instead. The position is different in the Senate, as the resignation of a validly elected Senator would give rise to a casual vacancy under s 15 of the Constitution, whereas disqualification results in an incomplete election and a special recount. For this reason, a court finding of disqualification is necessary in relation to Senators.

<sup>9</sup> Katharine Murphy, ‘Labor’s David Feeney resigns, triggering byelection in Batman’, *The Guardian*, 1 February 2018.

<sup>10</sup> *Re Nash [No 2]* [2017] HCA 5, [45].

term, or be relegated to the three year term,<sup>11</sup> as he was lower in the order of election.<sup>12</sup> This was resolved on 22 December 2017, with Jim Molan being declared as a duly elected Senator for the State of New South Wales, without any reference to whose place he filled or any implication as to the length of his term.<sup>13</sup> The issue was left on the basis that if anyone wished to challenge the capacity of the Senate to determine the length of Molan's term, that person could initiate future legal proceedings to do so.

The declaration of Lambie's replacement from Tasmania, Steve Martin, was also delayed by the question of whether or not he was incapable of being chosen because he held an office of profit under the Crown, being the office of Mayor of Devonport.<sup>14</sup> The High Court held unanimously that he was not disqualified on this ground<sup>15</sup> and he was declared elected on 9 February 2018. This in turn permitted the declaration of Parry's replacement, Richard Colbeck, which had been delayed due to mathematical uncertainties as to his election on the special Senate ballot recount if Martin had been declared disqualified.<sup>16</sup>

There was also a dispute about the replacement of Kakoschke-Moore in South Australia. The candidate who would replace her in a special recount, Timothy Storer, had left the Nick Xenophon Team and it was argued that his election would not reflect the choice of the voters.<sup>17</sup> It was also argued that now that Kakoschke-Moore had renounced her foreign citizenship, she should be counted in the special re-count and therefore fill the vacancy herself. The Court of Disputed Returns unanimously rejected those arguments, holding that Kakoschke-Moore could not fill her own vacancy and that Timothy Storer should not be excluded from the special count.<sup>18</sup>

In 2017 the High Court, sitting as the Court of Disputed Returns, handed down substantive judgments on three of the five different grounds for disqualification under s 44, being pecuniary interest in an agreement with the Public Service, conviction of an offence and being a citizen of a foreign power. A fourth ground, office of profit under the Crown, was briefly addressed when the High Court found that Hollie Hughes, who would have otherwise been chosen to fill the seat of Fiona Nash, was also incapable of being chosen because she acquired an office of profit under the Crown, being part-time membership of the Administrative Appeals Tribunal, after polling day but before the recount of the Senate vote.<sup>19</sup> As noted above, the High Court also held that Steve Martin's office as a mayor and local councillor did not amount to an office of profit under the Crown.<sup>20</sup>

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<sup>11</sup> As the previous election had been a double dissolution, s 13 of the Constitution required that the Senate divide the number of senators chosen for each State into two classes, being those with six-year terms and those with three-year terms. No direction is given as to the criteria to be used. The Senate chose to do so on the basis of the order of election, with the first six elected in each State receiving six-year terms and the last six receiving three-year terms. This ordering was disrupted by the disqualifications and special recounts in a number of States. There was uncertainty as to whether the Senate could re-visit its allocation or whether its power to divide into classes was spent once exercised.

<sup>12</sup> *Re Nash* [2017] HCATrans 256 (11 December 2017) (Gageler J). The same concern was raised in relation to filling the seats of Parry and Lambie: *Re Parry; Re Lambie* [2017] HCA Trans 258 (13 December 2017) (Nettle J).

<sup>13</sup> *Re Nash* [2017] HCATrans 272 (22 December 2017) (Gageler J).

<sup>14</sup> *Re Lambie* (C27 of 2017) [2017] HCATrans 258 (13 December 2017) (Nettle J).

<sup>15</sup> *Re Lambie* [2018] HCATrans 7 (6 February 2018).

<sup>16</sup> *Re Parry; Re Lambie* [2018] HCA Trans 6 (6 February 2018) (Nettle J).

<sup>17</sup> *Re Parry; Re Lambie; Re Kakoschke-Moore* [2017] HCATrans 254 (8 December 2017) (Nettle J).

<sup>18</sup> *Re Kakoschke-Moore* [2018] HCA Trans 15 (13 February 2018). Reasons were to be given at a later date.

<sup>19</sup> *Re Nash [No 2]* [2017] HCA 52. The Court observed at [9] that there 'could be, and was, no dispute that the position Ms Hughes held during the period between 1 July and 27 October 2017 answered the description of an "office of profit under the Crown" within the meaning of s 44(vi) of the Constitution'. The issue in the case was, rather, one of timing.

<sup>20</sup> At the time of writing, reasons for this decision had not been handed down. Those reasons are likely to be based upon the fact that the office is an elected one, not an appointment by the Crown, and the argument that the level of control over local councillors exercisable by the Crown, including with respect to their removal and remuneration, was insufficient to transform it into an office of profit under the Crown.

Disqualification on the ground of pecuniary interest in an agreement with the Public Service may also be further addressed in the common informer's action in *Alley v Gillespie*.<sup>21</sup> The only part of s 44 that is missing from recent judicial scrutiny is the bankruptcy ground, although this has been lurking in the background, with one replacement Senator being subject to allegations of disqualification on this ground.<sup>22</sup>

This article addresses what we have learnt so far from these cases and what we have yet to learn concerning the application of s 44 of the Constitution. It considers issues concerning the timing of disqualification, the High Court's approach to the interpretation of s 44 and lingering uncertainties concerning the identification and effect of dual citizenship, when an office of profit is 'under the Crown' and what type of arrangements are likely to amount to a pecuniary interest in an agreement with the Public Service. While more is known now about how s 44 will be interpreted than was known a year ago, there continue to be ambiguities and uncertainties that will have to be dealt with by the courts before a reasonably certain set of rules can be developed concerning its application. The s 44 game of musical seats has not yet stopped.

## Timing

The most difficult issue remains timing. Section 44 of the Commonwealth Constitution says that anyone who breaches one of its five grounds of disqualification is 'incapable of being chosen or of sitting as a senator or a member of the House of Representatives'. What the Constitution does not explain is what is meant by 'chosen'. Tying the provision to the point of being 'chosen' was an innovation when the Constitution was enacted, at least in relation to foreign allegiance, as the precedents from Canada, New Zealand and the Australian colonies (now the States) focused upon acts done *after* a person had become a member of Parliament.<sup>23</sup> This may have been because any person who had acquired foreign citizenship *before* election was not qualified to be elected, as he or she would have lost the status of a subject of the Crown by virtue of acquiring the foreign citizenship. Hence, there was no need to apply the disqualification to the process of election itself.

In contrast, the British source of disqualification for holding an office of profit under the Crown, the *Succession to the Crown Act 1707* (UK), provided that no person holding such an office 'shall be capable of being elected or of sitting or voting as a member of the House of Commons'. Presumably the drafters of the Commonwealth Constitution employed the 1707 terminology, but in relation to *all* grounds of disqualification, rather than just offices of profit under the Crown. They presumably also altered the word 'elected' to 'chosen' because the term needed to accommodate casual vacancies in the Senate which could be filled by the appointment of persons by the Governor of the State when the State Parliament was not in session.

Was a person chosen on nomination day, polling day, upon the declaration of the polls or at the return of the writs? British authorities in relation to disqualification for the holding of an office of profit under the Crown are not helpful, as uncertainty has reigned there as to the relevant date.<sup>24</sup>

<sup>21</sup> *Alley v Gillespie* (Case S190/2017). Note that the case will first address issues concerning the powers of the Court under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth), which may mean that the substantive constitutional issue is not reached: *Alley v Gillespie* [2017] HCATrans 257 (12 December 2017).

<sup>22</sup> Adam Gartrell, 'One Nation's Fraser Anning avoids bankruptcy, cleared to replace Malcolm Roberts', *Sydney Morning Herald*, 3 October 2017; Rosie Lewis and Michael McKenna, 'Pauline Hanson's bitter struggle to retain One Nation Senate seat' *The Australian*, 22 January 2018.

<sup>23</sup> *Re Canavan* [2017] HCA 45, [28]-[29] and [35].

<sup>24</sup> See, eg, UK, *First Report from the Select Committee on Elections*, HC 71-I, 11 February 1946, where the Committee found that Mr Harrison, Mrs Corbett and Mr Awbery were all disqualified as they held offices of profit under the Crown at both the polling date and the date of the declaration of the poll, whereas Mr Jones was not disqualified as his resignation from his office of profit was effective before the polling date. Note the discussion at p 9 of the minutes of evidence concerning the relevance

The most logical answer is that a person is ‘chosen’ upon the return of the writs. This is because the inscription of a person’s name on the writ and its return is the formal act which entitles a person to be sworn in as a Member of Parliament. While the people do the *choosing*, it is the return of the writ naming a person as officially elected that makes the person *chosen*. Such an interpretation would have allowed persons to stand for Parliament, even though they held a disqualifying disability,<sup>25</sup> such as an office of profit under the Crown but would allow them to divest themselves of that disqualifying disability after polling day, when it looked likely that they had won, but before the writ was returned. It has been argued against such an interpretation that this would mean that the people could not be confident that the candidate they elect could ever take up the office<sup>26</sup>—but as recent events have shown, that is already the case.<sup>27</sup>

In any event, the High Court has not taken this approach. In 1992 the High Court held in *Sykes v Cleary* that the relevant date for being ‘chosen’ was not a particular date, but the entire electoral process starting from the date of nomination.<sup>28</sup> The period in which a person is ‘chosen’ concludes at the time the election is completed,<sup>29</sup> which is normally indicated by the return of the writs for the election.<sup>30</sup> The High Court in *Re Canavan*, confirmed this interpretation, stating that it is settled authority that the ‘temporal focus for the purposes of s 44(i) is upon the date of nomination as the date on and after which s 44(i) applies until the completion of the electoral process’.<sup>31</sup>

The fact that it is a period, not a date, and one that, according to the Court of Disputed Returns, may extend for a long time if the election is not properly completed, leads to problems. What happens if during this period a disqualifying event occurs and is then removed? For example, what if a person is convicted of an offence that would trigger s 44(ii), but that conviction is later quashed, still within the election period? Is it enough that the candidate has become disqualified at any time during this period, or does that not matter if the disqualification has been removed by the time the election period is completed and the process of being chosen is over?

The High Court nodded obliquely to this potential problem in *Re Culleton*, where four Justices pointed out that no question as to the temporal operation of s 44 arose in that case. Their Honours contended that this was because Rodney Culleton’s conviction occurred before nomination and ‘persisted during the whole of the period from the time of nomination to the return of the writs for the election’.<sup>32</sup> As the later annulment of his conviction was not regarded as having a retrospective effect,<sup>33</sup> he was clearly incapable of being chosen during that election period.

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of the nomination date and how it is also the election date if there is only one candidate. See also the memorandum by the Attorney-General at Appendix 1, where he noted the difficulty of determining the date at which a member is ‘elected’.

<sup>25</sup> Section 45 of the Commonwealth Constitution refers to the disqualifications listed in s 44 as ‘disabilities’.

<sup>26</sup> *Sykes v Cleary* (1992) 176 CLR 77, 100 (Mason CJ, Toohey and McHugh JJ).

<sup>27</sup> As noted above, a significant number of persons declared elected at the 2016 double dissolution election were actually disqualified.

<sup>28</sup> *Sykes v Cleary* (1992) 176 CLR 77, 99-101 (Mason CJ, Toohey and McHugh JJ); 108 (Brennan J, agreeing); 130 (Dawson J agreeing) and 132 (Gaudron J, agreeing).

<sup>29</sup> See *Re Wood* (1988) 167 CLR 145, 168 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ), where their Honours stated that the disqualification of Senator Wood meant that his place had not been filled in the eye of the law but it ‘can be filled by completing the election after a recount of the ballot papers’.

<sup>30</sup> *Re Culleton [No 2]* [2017] HCA 4, [13] (Kiefel, Bell, Gageler and Keane JJ).

<sup>31</sup> *Re Canavan* [2017] HCA 45, [3].

<sup>32</sup> *Re Culleton [No 2]* [2017] HCA 4, [13] (Kiefel, Bell, Gageler and Keane JJ).

<sup>33</sup> *Re Culleton [No 2]* [2017] HCA 4, [29] (Kiefel, Bell, Gageler and Keane JJ).

Ordinarily, the critical point for the timing of disqualification is the start, not the end, of the period. This is because s 44 continues in its application after the completion of the election period because it also renders elected persons incapable of 'sitting'. Section 45 also provides that if a senator or member 'becomes subject to any of the disabilities' mentioned in s 44 his or her 'place shall thereupon become vacant'. It is therefore generally unnecessary to define the point at which 'chosen' finishes and the elected person is then disqualified from 'sitting'. But what if the Court rules that the election was not completed because the candidate who was declared to have won the seat proves to have been disqualified and therefore incapable of being chosen? In such a case, a special recount is ordered by the Court of Disputed Returns so as to complete the election.

When this occurs, as it has a number of times recently, the process of choosing may extend for a much longer period. This means that there was, potentially, a temporal paradox in relation to Rodney Culleton. The fact of his disqualification meant that the period of the election was extended, meaning that the annulment of his conviction technically occurred within that election period. While it is doubtful that even Culleton would have argued that his disqualification had the effect of extending the election period, allowing his disqualification to be removed during that period, so that he was validly elected after all, this is one of the potential temporal paradoxes that arises from tying being 'chosen' to a period rather than a particular date.

Another, more practical example of the anomalies arising from this reliance on being chosen over a period of time, is the case of Hollie Hughes. The disqualification of Fiona Nash as a Senator would have led, in a recount, to the election of Hollie Hughes. However, in the belief that she had not been elected, Hughes had taken up an office of profit under the Crown, causing her own disqualification. Two issues arose.

The first was whether the fact that the disqualifying disability occurred *after* nomination and was removed *before* the end of the period of being chosen was enough to exculpate her from disqualification. In *Re Nash [No 2]*, the Court of Disputed Returns did not accept that the occurrence and removal of a disqualifying disability during the election period was sufficient to negate disqualification. It held that Hughes was disqualified. The main dispute, however, concerned whether she was rendered 'incapable of being chosen' or whether she had been validly chosen at the time the election was held and was later disqualified by virtue of subsequently taking up her office of profit under the Crown. The critical difference was that if she had been validly chosen and later disqualified, this would give rise to a casual vacancy, which Hughes could then fill, having given up her office of profit under the Crown. If, however, she was incapable of being chosen, she would be excluded from the recount and the next candidate, Jim Molan, would be awarded the seat.

The Court held that Hughes was incapable of being chosen because her disqualifying disability occurred within the elongated election period. Their Honours concluded that the process of being chosen is not brought to an end until the election of a qualified, and not disqualified, candidate is declared, followed by the formality of the return of the writ.<sup>34</sup> Their Honours accepted the finding in *Vardon v O'Loughlin* that when an election is invalid, it is to be treated as if it had never been completed.<sup>35</sup> Hughes was therefore incapable of being elected because her disqualifying disability fell during the election period. The seat was to be filled by a further recount. The Court noted that it was a voluntary act on the part of Hughes to take up the office of profit and that by 'choosing to accept the appointment for the future, Ms Hughes forfeited the opportunity to benefit in the future from any special count of the ballot papers that

<sup>34</sup> *Re Nash [No 2]* [2017] HCA 5, [38]-[39] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

<sup>35</sup> *Vardon v O'Loughlin* [(1907) 5 CLR 201, 208-9; *Re Nash [No 2]* [2017] HCA 5, [42]-[43].

might be directed as a result of such a vacancy [by reason of disqualification of a chosen candidate] being found'.<sup>36</sup>

A further temporal problem was raised, but not resolved, in Culleton's case. What happens if a disability is removed with retrospective effect so that in law it never happened? Culleton argued that the subsequent annulment of his conviction meant that it had never legally occurred and therefore he was not disqualified. The Court did not need to decide this issue because it could resolve the case on the narrower point that the legislation that gave effect to the annulment did not have retrospective effect, so that the initial conviction stood at the time of nomination and thereafter.

Justice Nettle, however, went further, addressing what the position would have been if the annulment had been given retrospective effect. He held that s 44(ii) was 'directed to a conviction in fact regardless of whether it is subsequently annulled'.<sup>37</sup> He considered that there was no room for 'contingent qualification' and that the Constitution required 'certainty that, at the date of nomination, a nominee is capable of being chosen'.<sup>38</sup> Nettle J concluded that an 'understanding of s 44(ii) as requiring order and certainty in the electoral process' accords with the system of representative and responsible government established by the Constitution.<sup>39</sup> Given the Court's recent concern in *Re Canavan* for certainty and stability, it is likely that the rest of the Court would follow this approach if the issue were to require determination in the future.

A final timing problem concerns the fact that while the initiation of the removal of a disqualification may be under the control of the candidate, its completion is usually not. It is dependent on the acts of others. What happens if a person has taken all reasonable steps to rid himself or herself of a disqualifying disability (eg renouncing foreign citizenship, resigning from an office of profit or selling shares in a corporation that holds an agreement with the Commonwealth Public Service) but it is not processed and given effect before nomination? A number of Labor members took action before nomination to renounce foreign citizenship, but it was not processed in the relevant country until sometime after nomination. This meant that at the time of nomination, they still held dual citizenship. Were they incapable of being chosen, even though they had done everything they could in advance of the nomination date, because they were still technically dual citizens at the time of nomination?

Again, we do not know for sure. In *Re Canavan*, the High Court seemed to wish to confine the notion of 'reasonable steps'. It said:

Section 44(i) is cast in peremptory terms. Where the personal circumstances of a would-be candidate give rise to disqualification under s 44(i), the reasonableness of steps taken by way of inquiry to ascertain whether those circumstances exist is immaterial to the operation of s 44(i).<sup>40</sup>

The reasonable steps that must be taken are those required by the foreign law for renunciation of citizenship.<sup>41</sup> It is not enough to say one took reasonable steps to inform oneself of one's status regarding qualification or disqualification.

But what if the candidate has taken all the steps which he or she can take to renounce foreign citizenship under the foreign law, but is awaiting the response of the foreign country? Is it not

<sup>36</sup> *Re Nash [No 2]* [2017] HCA 5, [45].

<sup>37</sup> *Re Culleton [No 2]* [2017] HCA 4, [57] (Nettle J).

<sup>38</sup> *Re Culleton [No 2]* [2017] HCA 4, [57] (Nettle J).

<sup>39</sup> *Re Culleton [No 2]* [2017] HCA 4, [59] (Nettle J).

<sup>40</sup> *Re Canavan* [2017] HCA 45, [61].

<sup>41</sup> *Re Canavan* [2017] HCA 45, [72].

a reasonable step if it is not taken early enough for the process to be completed in time? For example, is it unreasonable to take the steps two or three days before nomination? It has been suggested that one reason why candidates, despite sometimes having been pre-selected as long as a year before the election, have waited until as late as possible to renounce their dual citizenship before the nomination date is that they wanted to ensure it was not processed prior to the election, so that if they did not win, they could withdraw the renunciation and retain their foreign citizenship. Is this kind of equivocal renunciation sufficient to avoid disqualification?

In contrast, a person might have been pre-selected shortly before a by-election or early election was held and may have acted promptly and with due diligence to renounce his or her foreign citizenship but not had sufficient time for the renunciation to take effect prior to the nomination date. Should a prospective candidate be held hostage to disqualification by short time-frames or the amount of time that it may take for renunciation to be processed and recorded by the bureaucracy in a foreign country?

Despite the duelling opinions of David Bennett QC for the Commonwealth<sup>42</sup> and Peter Hanks QC for the Labor Party,<sup>43</sup> expressing adamant views on opposite sides, the issue was left unclear by the Court of Disputed Returns in *Re Canavan*. On the one hand, when the taking of 'reasonable steps' was recognised as the relevant test in *Re Canavan*, it was in the context of the constitutional imperative to avoid the irremediable exclusion of citizens from being capable of election to Parliament.<sup>44</sup> The Court in *Re Canavan* did not expressly recognise the application of a reasonable steps test in circumstances where the other country permitted renunciation by the taking of steps that could be reasonably performed and which did not involve risks to the person or property of the candidate.<sup>45</sup>

On the other hand, the High Court in *Re Canavan* upheld the authority of the majority judgment in *Sykes v Cleary* in circumstances where that Court appeared to accept that it was enough that a candidate take all reasonable steps to renounce his or her citizenship, where renunciation is permitted or is a matter of discretion by the appropriate Minister.<sup>46</sup> One could therefore argue that *Re Canavan* implicitly accepted that all that is needed is for a candidate to take all the reasonable steps that he or she can take before the nomination date, regardless of whether it is processed in time.

While a number of Members of Parliament appear to be affected by this issue, only one such case, that of Senator Katy Gallagher, has at the time of writing, been referred to the High Court. Senator Gallagher was chosen by the ACT Legislative Assembly to fill a casual vacancy in the Senate on 25 March 2015. At that time, she provided a statutory declaration to the ACT Legislative Assembly declaring that she was not a dual citizen.<sup>47</sup> It transpired, however, that she was a dual citizen at that time, holding United Kingdom citizenship by descent from her father, and that she did not take action to renounce that citizenship until April 2016, over a year later. While this delay may have been due to ignorance as to her status, the High Court did not accept in *Re Canavan* that ignorance was an excuse. Gallagher was therefore incapable of being chosen as a Senator in March 2015 and had sat invalidly in the Senate until the next election. Further, her renunciation did not take effect until 16 August 2016, which was after both the nomination date of 9 June 2016 and the polling date of 2 July

<sup>42</sup> David Bennett QC, 'Opinion – Re Justine Keay MP, Susan Lamb MP and Rebekha Sharkie MP' 10 November 2017.

<sup>43</sup> Peter Hanks QC, 'Opinion – Section 44(i) of the Constitution and Justine Keay, Susan Lamb and Rebekha Sharkie' 13 November 2017

<sup>44</sup> *Re Canavan* [2017] HCA 45, [13], [43]-[46], [72].

<sup>45</sup> *Re Canavan* [2017] HCA 45, [69].

<sup>46</sup> *Re Canavan* [2017] HCA 45, [64]-[65] and [68].

<sup>47</sup> See further: Australian Capital Territory, Legislative Assembly, *Hansard*, 28 November 2017, p 5099.

2016. The question then arises as to whether the fact that she had taken all steps within her control prior to the nomination date was sufficient.

Gallagher's case would potentially resolve the position of other vulnerable members, if the High Court were to decide either that it is enough for the candidate to take all steps within his or her control to renounce his or her foreign citizenship before the nomination date, or if it decided that renunciation had to be finalised before that date. However, it is also possible that even if the High Court applied a 'reasonable steps' test, it could find that Gallagher had not acted reasonably, as she had not taken action before her original appointment to the Senate or immediately thereafter, waiting more than a year before taking any action to renounce her foreign citizenship.

Until the issue is resolved, it would be prudent for any candidate for election to ensure all s 44 disabilities are removed and properly processed well before the nomination date.

## Section 44 – Interpretative approach

In *Re Canavan*, the High Court, fulfilling its role as the Court of Disputed Returns, again applied a very strict approach in its constitutional interpretation. It chose to adhere closely to the ordinary and natural meaning of the language of the section.<sup>48</sup> The factor that seemed to influence the Court most was the need for stability and certainty.<sup>49</sup> This also influenced its approach in *Re Culleton*, as is particularly evident in the judgment of Nettle J,<sup>50</sup> and was an issue that was closely addressed in *Re Day*, particularly by Gageler J.<sup>51</sup> Where there are constructional choices in relation to the application of s 44, stability, certainty and the setting of a clear rule for the future will be given priority by the Court. As Gageler J said, Members of Parliament 'should know where they stand' and 'are entitled to expect tolerably clear and workable standards by which to gauge the constitutional propriety of their affairs'.<sup>52</sup>

In *Re Canavan*,<sup>53</sup> there was close adherence to the earlier authority of *Sykes v Cleary*<sup>54</sup> and little reliance was placed on the purpose of the provision.<sup>55</sup> In contrast, in *Re Day*, earlier authority was overturned and significant reliance was placed upon the identification of a broader purpose in doing so. So the influence of both purpose and authority will depend on the particular case and is unpredictable.

In all three cases – *Re Day*, *Re Culleton* and *Re Canavan* – the High Court took an approach that expanded, rather than narrowed, the potential circumstances in which s 44 applies. It gave little scope for excuses or exceptions. This suggests that legal advice in this area in the future should err on the side of prudence and caution. Apart from the judgment of Barwick CJ in *Re Webster*, all the successive cases on s 44 have involved strict and arguably harsh<sup>56</sup> interpretations of it. The High Court has regarded s 44 as an important provision to maintain the integrity of Parliament and has shown that it is prepared to enforce it, no matter how unpopular this makes it with politicians. What remains unknown is whether these assertions

<sup>48</sup> *Re Canavan* [2017] HCA 45, [19].

<sup>49</sup> *Re Canavan* [2017] HCA 45, [48], [54], and [57].

<sup>50</sup> *Re Culleton [No 2]* [2017] HCA 4, [57]-[59] (Nettle J).

<sup>51</sup> *Re Day [No 2]* [2017] HCA 14, [97] (Gageler J).

<sup>52</sup> *Re Day [No 2]* [2017] HCA 14, [97] (Gageler J).

<sup>53</sup> *Re Canavan* [2017] HCA 45, [23], [24], [39], [46], [53], [67].

<sup>54</sup> *Sykes v Cleary* (1992) 176 CLR 77.

<sup>55</sup> Historical material that was sought to be used to support a narrower purpose was rejected by the Court at [27]-[36] and the Court took a constrained and arguably artificial view at [24]-[26] of how the second limb of s 44 was intended to give effect to a purpose of preventing split allegiance.

<sup>56</sup> The Court in *Re Canavan* conceded that its interpretation of s 44(i) may be said to be 'harsh' but contended that diligence and serious reflection are required before nomination: *Re Canavan* [2017] HCA 45, [60]. See also: *Re Nash [No 2]* [2017] HCA 52, [45].

about the need to maintain the integrity of Parliament will develop into a more coherent underlying rationale for the interpretation of s 44 or provide a foundation for future constitutional implications.

### Section 44(i)

In *Re Canavan*, the High Court approached s 44(i) as having two limbs.<sup>57</sup> The first limb, which deals with acknowledgement, adherence and obedience to a foreign power, was regarded as involving an ‘exercise of the will of the person concerned’.<sup>58</sup> It required a voluntary act of allegiance on the part of the person concerned. The second limb, concerning being a subject or citizen of a foreign power or being entitled to the rights of such a citizen or subject, was regarded as involving questions of legal status or rights under the law of the foreign power. No act of will or even knowledge of the circumstances was required of the person who held such status or rights.<sup>59</sup> The Commonwealth’s arguments about the need for knowledge or reasonable suspicion of foreign citizenship and the need for a reasonable time in which to renounce foreign citizenship once a person becomes aware of it, were swept away by the High Court as inconsistent with the application of the second limb of s 44(i).<sup>60</sup>

While the Court accepted that the purpose of s 44(i) was to ensure that members of Parliament do not have a ‘split allegiance’,<sup>61</sup> it saw this purpose as being achieved in different ways by the two limbs of s 44(i). While the first limb looked to that conduct of the person concerned, which would encompass knowledge of split allegiances, the second limb did not address conduct or a person’s ‘subjective feelings of allegiance’.<sup>62</sup> Instead, it was directed at the ‘existence of a duty to a foreign power as an aspect of the status of citizenship’,<sup>63</sup> regardless of whether or not the person knew of that status or was minded to act upon it.

### *Foreign Law*

The Court confirmed that whether ‘a person has the status of a subject or a citizen of a foreign power necessarily depends upon the law of the foreign power’ because only a foreign law can be the source of that status of citizenship or the rights attached to it.<sup>64</sup> This has the unfortunate consequence that the application of a provision of the Australian Constitution is dependent upon the vagaries of foreign law—which might be changed without notice, or applied with retrospective effect, or be unclear in its application, as was the case in relation to the Italian law applicable to the citizenship status of Senator Canavan.<sup>65</sup>

Senator Canavan’s survival is the great oddity of this case. The Court noted that Senator Canavan had been entered on the ‘Register of Italians Resident Abroad’ in 2006 which entitled him to vote in Italian elections and had been registered by the Municipality of Lozzo di Cadore on 18 January 2007.<sup>66</sup> Even though the Italian consulate described this as being registered as a citizen, the Court did not regard it this way.

The Court instead identified as the potential source of Senator Canavan’s citizenship status, a decision of the Italian Constitutional Court in 1983. It had held that a law restricting the

<sup>57</sup> *Re Canavan* [2017] HCA 45, [21]-[23].

<sup>58</sup> *Re Canavan* [2017] HCA 45, [21].

<sup>59</sup> *Re Canavan* [2017] HCA 45, [21].

<sup>60</sup> *Re Canavan* [2017] HCA 45, [47]-[60] and [71].

<sup>61</sup> *Re Canavan* [2017] HCA 45, [24].

<sup>62</sup> *Re Canavan* [2017] HCA 45, [25].

<sup>63</sup> *Re Canavan* [2017] HCA 45, [26].

<sup>64</sup> *Re Canavan* [2017] HCA 45, [37].

<sup>65</sup> *Re Canavan* [2017] HCA 45, [74]-[87].

<sup>66</sup> *Re Canavan* [2017] HCA 45, [78].

inheritance of citizenship to the male line was invalid to the extent that it discriminated against female Italians. The effect of that decision was said to be retrospective, so that from 1948 children with a mother who was an Italian citizen were also Italian.<sup>67</sup> In this manner, Senator Canavan would have inherited Italian citizenship through his mother and grandmother, making him, with retrospective effect, an Italian at birth.

However, there was also evidence before the Court that Senator Canavan had not applied for a separate declaration of Italian citizenship.<sup>68</sup> There was uncertainty as to whether this positive act was required to activate what may otherwise have been 'potential' citizenship. A distinction was drawn in the evidence before the Court between registration as an Italian Resident Abroad for voting purposes, and the declaration of Italian citizenship. The Court concluded that on 'the evidence before it' it could not be satisfied that Senator Canavan was a citizen of Italy and it preferred an interpretation that positive steps were required as conditions precedent to citizenship, given the potential for Italian citizenship by descent to extend indefinitely.<sup>69</sup>

What it did not address was whether he satisfied the other part of the second limb of s 44(i) by being 'entitled to the rights or privileges of a subject or a citizen of a foreign power', as he was entitled to vote in Italian elections as a registered Italian resident abroad. Holding a right to vote, even without holding citizenship, should arguably trigger the application of the last part of s 44(i).<sup>70</sup> It is curious that this was not addressed by the Court. Perhaps the Court took the view that the right to vote was not, in this case, a privilege of citizenship or that Canavan was never validly registered to vote. The judgment is just not clear on this issue.

It is also curious that the Court did not seek to obtain further evidence and to hold a separate hearing to resolve the question of Canavan's status under s 44(i), as it had done in relation to Malcolm Roberts when there was contested evidence. While the Court was under time-pressure to deliver a speedy judgment, this ought not to have prevented it from obtaining the evidence necessary to resolve this aspect of the dispute. This part of the judgment raised the suspicion that an unsatisfactory compromise was reached to ensure the maintenance of a unanimous decision delivered in a short period of time. It does not make for a sustainable precedent.

What the judgment tells us about foreign law, however, is twofold. First, the fact that the law changed with retrospective effect was not regarded as a ground for excluding the application of s 44(i). Hence, Members of Parliament who currently are not dual citizens may need to be aware of whether they have the potential to acquire citizenship with retrospective effect. The most common circumstance in which this occurs is where citizenship through the maternal line has been previously denied and then later is corrected with retrospective effect due to the discriminatory nature of the law. Another circumstance is where past discriminatory laws, such as those revoking citizenship for Jewish people in European countries in the 1930s, are removed with retrospective effect.

The second is that while foreign law applies, it is the High Court that will interpret the foreign law and how it should be considered to apply to the Member in question. It was the High Court that concluded that a positive act of registration was required to activate Italian citizenship. While its finding may have been based upon expert evidence, it was the Court that took the policy view that it should adopt that particular interpretative choice, given the fact that

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<sup>67</sup> *Re Canavan* [2017] HCA 45, [81].

<sup>68</sup> *Re Canavan* [2017] HCA 45, [86].

<sup>69</sup> *Re Canavan* [2017] HCA 45, [86].

<sup>70</sup> Note, however, that s 44(i) refers to 'rights and privileges' in the plural, so there may be an argument that it must include, all or some, rather than one, of those rights and privileges.

citizenship could pass down for generations, which was described in the proceedings as an 'exorbitant' law.

### *The nature of citizenship*

Despite these very limited exceptions to the strict application of s 44(i), there is another way by which its application may be avoided. This is when the nature of the citizenship held is such that it cannot be described as genuine citizenship. This was so in the case of Senator Nick Xenophon. His status as a 'British overseas citizen' was not regarded by the Court as sufficient to trigger the application of s 44(i) because it did not confer the main attributes of citizenship, such as the right of abode. This status did not allow Xenophon to enter or reside in the United Kingdom.<sup>71</sup> Nor did it impose a duty of loyalty to the United Kingdom, although there was still a duty of loyalty to the Queen.<sup>72</sup>

As the status of a British overseas citizen did not confer the rights or privileges normally attached to citizenship, such as the right of abode, and did not entail any reciprocal obligation of allegiance to the United Kingdom or to the Queen in right of the United Kingdom, the Court held that s 44(i) did not disqualify Senator Xenophon from being chosen.

### **Other aspects of s 44**

While most of the recent controversy concerning s 44 has concerned dual citizenship, this is nowhere near its most difficult and potentially dangerous aspect. Far greater peril would appear to lurk in the uncertainties concerning offices of profit under the Crown in s 44(iv) and pecuniary interests in agreements with the public service in s 44(v).

#### *Office of profit under the Crown – s 44(iv)*

Phil Cleary's disqualification in 1992 for being a school teacher on leave without pay<sup>73</sup> shed some light on the ground of office of profit under the Crown. It confirmed that an office continued to be held, even when the officer was 'unattached' and on leave without pay. The office remained one of profit even though no profit was actually received, as long as a right to receive profit was attached to the office.<sup>74</sup> Thus the fact that Cleary was not being remunerated because he was on leave without pay was irrelevant.

Further, it did not matter that the office was under a separate Crown, the Crown of Victoria.<sup>75</sup> Even though the office was not within the gift or control of the Commonwealth executive, so that the rationale of preventing executive influence over parliamentarians could not apply, the Court recognised that there were other rationales for s 44(iv), such as the avoidance of incompatibility between offices, which might arise through conflicting duties or incompatible time commitments. Mason CJ, Toohey and McHugh JJ observed that there are three factors that give rise to incompatibility:

First, performance by a public servant of his or her public service duties would impair his or her capacity to attend to the duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the Minister of his or her department and would not bring to bear as a member of the House a free and independent judgment. Thirdly,

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<sup>71</sup> *Re Canavan* [2017] HCA 45, [132].

<sup>72</sup> *Re Canavan* [2017] HCA 45, [133].

<sup>73</sup> *Sykes v Cleary* (1992) 176 CLR 77.

<sup>74</sup> *Sykes v Cleary* (1992) 176 CLR 77, 97-8 (Mason CJ, Toohey and McHugh JJ) and 117-8 (Deane J).

<sup>75</sup> *Sykes v Cleary* (1992) 176 CLR 77, 98 (Mason CJ, Toohey and McHugh JJ) and 118 (Deane J).

membership of the House would detract from the performance of the relevant public service duty.<sup>76</sup>

Their Honours concluded that the rationale for the disqualification of a State teacher from being a member in the Commonwealth Parliament was the incompatibility of office on the above three grounds. They added, in relation to State public servants, that the 'risk of a conflict between their obligations to their State and their duties as members of the House to which they belong is a further incident of the incompatibility of being, at the same time, a State public servant and a member of the Parliament'.<sup>77</sup>

Notwithstanding the explication of s 44(iv) in *Sykes v Cleary*, there is still a lot that is unknown about its operation. One particular question which has often been mooted, but not the subject of litigation until it arose in relation to the replacement of Jacqui Lambie, is whether the holding of an office as a local councillor amounts to an office of profit under the Crown. In earlier times, this issue did not arise as local councillors were unpaid. Today, however, even though it is often couched in terms of an 'allowance', local councillors receive a form of profit, being remuneration beyond the reimbursement of actual expenses.

As the office is now one 'of profit', the question is whether or not it is 'under the Crown'. One distinction from public servants is that local councillors are elected, rather than appointed by the Crown (although administrators may be appointed when a local council is dismissed from office). Is this distinction sufficient to exempt the office of local councillor from being an office of profit under the Crown, or could an executive power to remove councillors, instruct them or alter their remuneration, be sufficient to classify their offices as being 'under the Crown'?

This leads to the question of how the term 'under the Crown' is to be interpreted in light of the purposes of the provision? For example, if a Court were to regard the rationale for the provision to be prevention of members being influenced by executive appointments, then election to the office of local councillor would not be an office that is 'under the Crown' because it is not within the gift of the Crown. However, if, as in *Sykes v Cleary*, it is recognised that the purpose of the provision extends to preventing incompatible public offices from being held simultaneously, then there is a much stronger argument that the office of local councillor involves incompatible duties and obligations to that of a member of Parliament and that a broader approach should be taken to the term 'under the Crown', including incompatible public sector offices that are elective in nature.

It can only be hoped that some light will be shed on these issues when the High Court, as the Court of Disputed Returns, hands down its reasons for its unanimous decision<sup>78</sup> that Steve Martin did not hold an office of profit under the Crown for holding the office of local councillor and mayor in Tasmania.<sup>79</sup>

Another uncertain area is employment in a university. This is relevant to Andrew Bartlett, who replaced Larissa Waters, and who held a research position in a university at the time that he nominated as a candidate at the 2016 election. Such an office would be an office of profit. The question is whether it is 'under the Crown'. Public universities are established under statute and their employees are paid out of public sector funds. The question would be whether the relevant university was sufficiently independent from executive control that its officers would not be regarded as being 'under the Crown'. This may differ from State to State and in relation to different universities.

<sup>76</sup> *Sykes v Cleary* (1992) 176 CLR 77, 96 (Mason CJ, Toohey and McHugh JJ) (footnotes excluded).

<sup>77</sup> *Sykes v Cleary* (1992) 176 CLR 77, 98 (Mason CJ, Toohey and McHugh JJ).

<sup>78</sup> *Re Lambie* [2018] HCATrans 7 (6 February 2018).

<sup>79</sup> Note that the decision may be dependent upon the particular laws in Tasmania regarding executive control over local councillors and will not necessarily apply to local councillors in other States.

If one takes, as an example, the Australian National University,<sup>80</sup> it is established by statute as a body corporate<sup>81</sup> and is governed by a Council. Although a Commonwealth Minister has the power to appoint seven members of the 15 member Council, he or she acts upon the recommendation of the Nominations Committee of Council and is prohibited from appointing a current member of Parliament to the Council.<sup>82</sup> It is the University, not the Minister, which has the power to employ and dismiss staff.<sup>83</sup> The University is subject to the application of the *Public Governance, Performance and Accountability Act 2013* (Cth) which imposes a degree of accountability to the government, but the Council is not required to ‘do anything that will or might affect the academic independence or integrity of the University’.<sup>84</sup> On balance, employment at ANU is probably too remote from the Crown to amount to an office of profit under it and is less likely to give rise to a conflict of interest than an office as a local councillor. However, we cannot be completely sure of this until it is ruled upon by a court. The situation may also be different at other universities under different legislation.

#### *Pecuniary interests in agreements with the Public Service – s 44(v)*

The most difficult part of s 44 is disqualification for having a ‘direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons’.

The High Court in *Re Day [No 2]* extended the interpretative scope of this provision, both in relation to its purpose and its application. The Court rejected the narrow view of its purpose taken by Barwick CJ in *Re Webster*,<sup>85</sup> that it was confined to potential influence by the Commonwealth over members of Parliament.<sup>86</sup> Kiefel CJ, Bell and Edelman JJ observed that the object of s 44(v) is ‘to ensure not only that the Public Service of the Commonwealth is not in a position to exercise undue influence over members of Parliament through the medium of agreements; but also that members of Parliament will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict’.<sup>87</sup>

Kiefel CJ, Bell and Edelman JJ observed that ‘parliamentarians have a duty as a representative of others to act in the public interest’ and that they have ‘an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations’.<sup>88</sup> In a similar vein, Nettle and Gordon JJ said that the ‘fundamental obligation of a member of Parliament is “*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community”’.<sup>89</sup>

<sup>80</sup> Note, in contrast, that most universities are established by State legislation, although much of their funding comes from the Commonwealth. The Australian National University is an exception, being established by Commonwealth legislation.

<sup>81</sup> *Australian National University Act 1991* (Cth), s 4. Note that the mere fact that the office is attached to a corporation is not necessarily enough to prevent it being an office of profit under the Crown. For example, in the United Kingdom the office of director of a corporation was found to be an office of profit under the Crown. It was a condition of the grant of a government loan to the corporation was that a minister could appoint two directors to the corporation while the loan was outstanding. When one of those directors became a member of Parliament he was found to be disqualified: UK, *Report from the Select Committee on Elections*, 12 July 1955, HC 35, p iii-iv.

<sup>82</sup> *Australian National University Act 1991* (Cth), s 10.

<sup>83</sup> *Australian National University Act 1991* (Cth), s 6.

<sup>84</sup> *Australian National University Act 1991* (Cth), s 4A.

<sup>85</sup> *Re Webster* (1975) 132 CLR 270.

<sup>86</sup> *Re Day [No 2]* [2017] HCA 14, [51] (Kiefel CJ, Bell and Edelman JJ); [98] (Gageler J); [161] (Keane J); and [263]-[264] (Nettle and Gordon JJ).

<sup>87</sup> *Re Day [No 2]* [2017] HCA 14, [48] (Kiefel CJ, Bell and Edelman JJ).

<sup>88</sup> *Re Day [No 2]* [2017] HCA 14, [49] (Kiefel CJ, Bell and Edelman JJ). See also [183] (Keane J).

<sup>89</sup> *Re Day [No 2]* [2017] HCA 14, [269] (Nettle and Gordon JJ) [original emphasis].

This is the standard by which parliamentarians will be judged in relation to disqualification. Their Honours regarded s 44 as having a special status because it is 'protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy'. This was considered more important than the effect of disqualification upon a particular Member.<sup>90</sup>

The Court also expanded the application of s 44(v) beyond legal interests. It looked to the 'practical effect' of the agreement upon a person's pecuniary interests.<sup>91</sup> 'Beneficiaries of a discretionary trust, which benefits from, or via its trustee is party to, an agreement' with the Public Service may be regarded as holding an indirect pecuniary interest in that agreement.<sup>92</sup> Hence, the common use of family trusts by Members of Parliament will not be sufficient to avoid the application of s 44(v).

However, agreements ordinarily made between the government and a citizen, such as paying for a passport, will not trigger s 44(v).<sup>93</sup> Kiefel, Bell and Edelman JJ observed that one must look to 'the personal financial circumstances of a parliamentarian and the possibility of a conflict of duty and interest' as this is the mischief towards which the provision is addressed.<sup>94</sup> Nettle and Gordon JJ described s 44(v) as applying only when by reason of the existence, performance or breach of the agreement with the Public Service, the person 'could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or that person could conceivably prefer their private interests over their public duty'.<sup>95</sup>

This leaves a lot of uncertainty about the application of s 44(v), as is evidenced by the case of *Alley v Gillespie*. The question there is whether the sub-lease of an Australia Post outlet in a shopping centre owned by the family company of a parliamentarian, David Gillespie, would be an agreement with the Public Service in which Dr Gillespie has an indirect pecuniary interest.

The first question is whether the sub-lease with Australia Post would amount to an agreement with the 'Public Service', or whether Australia Post, as a corporatised entity, would fall outside of the 'Public Service'.<sup>96</sup> In *Re Day*, both Gageler J and Keane J stressed that 'Public Service' does not mean the Executive Government or the Commonwealth as a polity.<sup>97</sup> On the other hand, Nettle and Gordon JJ did not regard it as necessary to give 'some narrow or limited operation to the notion of "the Public Service of the Commonwealth" that would exclude agreements specifically authorised by statute'.<sup>98</sup> Whether an agreement with Australia Post could trigger s 44(v) remains unclear.

The second issue is whether, assuming that the agreement was an ordinary standard contract which was entered into without any involvement or influence by Dr Gillespie, he could be regarded as having an indirect pecuniary interest in it. If no influence was involved in securing the contract, either by the Commonwealth seeking to influence Dr Gillespie or Dr Gillespie

<sup>90</sup> *Re Day [No 2]* [2017] HCA 14, [72] (Kiefel CJ, Bell and Edelman JJ).

<sup>91</sup> *Re Day [No 2]* [2017] HCA 14, [54] (Kiefel CJ, Bell and Edelman JJ).

<sup>92</sup> *Re Day [No 2]* [2017] HCA 14, [62] (Kiefel CJ, Bell and Edelman JJ). See also Gageler J at [90] and [92]; Keane J at [190]-[192]; and Nettle and Gordon JJ at [253] and [287].

<sup>93</sup> *Re Day [No 2]* [2017] HCA 14, [69] (Kiefel CJ, Bell and Edelman JJ); [102] (Gageler J); [200] (Keane J).

<sup>94</sup> *Re Day [No 2]* [2017] HCA 14, [66] (Kiefel CJ, Bell and Edelman JJ).

<sup>95</sup> *Re Day [No 2]* [2017] HCA 14, [260] (Nettle and Gordon JJ).

<sup>96</sup> Note that in 1874, John Ramsay was disqualified from the House of Commons for holding 'four sixty-fourth shares in a steam vessel, the owners of which were under an agreement with the Postmaster General for the conveyance of Her Majesty's mails to and from the Island of Islay, in consideration of an annual allowance of £150.' UK, House of Commons Journals, 19 March 1874, Vol 129, p 12.

<sup>97</sup> *Re Day [No 2]* [2017] HCA 14, [105]-[106] (Gageler J) and [199] (Keane J).

<sup>98</sup> *Re Day [No 2]* [2017] HCA 14, [265] (Nettle and Gordon JJ).

seeking to use his position to influence the Commonwealth, then the risk of a breach of s 44 is diminished. Assuming, in the absence of the facts, that the contract between the tenant and Australia Post had nothing to do with Dr Gillespie or his status as a Member of Parliament and the contract was conducted on a normal commercial basis, this case is quite different from that of Senator Day, who actively lobbied the Commonwealth to enter into the contract regarding his electoral office.

Nonetheless, there remains the question of whether the performance of the contract could conceivably influence Dr Gillespie to prefer his private financial interest over his public duty. This will turn on the relevant facts of the situation and whether the rent that Dr Gillespie's family company received from its tenant in the shopping centre was dependent upon the performance of the contract between the tenant and Australia Post. The High Court's very strict interpretation of s 44(i) in *Re Canavan* may bode ill for Dr Gillespie to the extent that it indicates the Court is unwilling to take a flexible or pragmatic approach to the interpretation of s 44.

If Dr Gillespie is found to be disqualified as a result of the application of s 44(v), this could start a further wave of disqualifications, as the activities of family trusts and family companies are closely scrutinised for any agreements with government bodies, including corporatised entities, such as Australia Post.

## Conclusion

There is a lot we still do not know about the intricacies of the application of s 44 of the Constitution. Nonetheless, nearly all of these problems can be avoided by candidates acting out of an abundance of caution to avoid all disqualifying disabilities well before they nominate for office. This may discourage some people from standing for office, particularly if they would not be contesting a safe seat and their chances of being elected are low. While a different approach to the meaning of 'chosen' by the High Court may have alleviated that problem to some extent by giving people the ability to take action to remove disqualifying disabilities after polling day but before the return of the writs, it now seems unlikely that the High Court will change course on that issue.

While the Commonwealth Parliament could legislate to prevent or restrict the circumstances in which disqualification cases may come before the courts and the Houses could refuse to refer matters of disqualification to the courts, this is not an adequate response to the current problem. Harboring disqualified persons in Parliament, in breach of the Constitution, without any recourse to courts of law, would be an act that is likely to bring the Parliament and the Government into disrepute.

The only other option, apart from prudence, is a constitutional referendum to reform s 44. One approach would be to repeal s 44 and replace it with a power to legislate for disqualification, allowing for clearer rules and the passage of amendments to deal with anomalies where necessary. This would run the risk, however, of partisan legislation when one party controlled both Houses. It could potentially legislate in such a way as to disqualify persons who hold attributes connected with a political party, such as union membership. Another approach would be to retain constitutional disqualifications, but to permit legislation to provide exemptions from disqualification where appropriate, such as the exclusion of particular offices of profit from the application of s 44(iv). Such a legislative power, being limited to exemption from disqualification rather than permitting new grounds of disqualification, would be a less dangerous tool.

Alternatively, specific amendments could be made to clarify current uncertainties or difficulties in the interpretation of s 44. This could include an alteration as to the timing of being 'chosen'

and permitting the renunciation of foreign citizenship to be determined by Australian, not foreign, law.<sup>99</sup>

While a good case could be made for updating and clarifying aspects of s 44 of the Constitution, it remains doubtful that such a referendum would pass, particularly in the face of competing priorities for constitutional reform. It may well be that in the end, prudence and vigilance by candidates and parties is the best means of preventing a disqualification crisis from arising in the future.

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<sup>99</sup> Note that the Joint Standing Committee on Electoral Matters, at the time of writing, was conducting an inquiry into possible legislative responses and constitutional reforms to s 44, which was scheduled to report in 2018.

## **‘Purity of Election’: Foreign Allegiance and Membership of the Parliament of New South Wales**

**Mel Keenan**

Director, Legal and Governance, NSW Electoral Commission<sup>100</sup>

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### **Abstract**

In 2017, the High Court’s strict application of s 44(1) of the Australian Constitution caused considerable turnover in the membership of the Australian Parliament, particularly the Senate.<sup>101</sup> This paper examines the ‘foreign allegiance’ disqualification in relation to membership of the Parliament of New South Wales contained in s.13A(1)(b) of the New South Wales Constitution Act 1902, comparing its likely application with that of s.44(i), and offers a suggestion as to a more effective 21<sup>st</sup> century alternative to the disqualification.

### **Introduction**

In 2017, the parade of members of the Commonwealth Parliament on the evening news acknowledging that they may never have been eligible for election by dint of their dual citizenship provided a rare example of the provisions of the Australian Constitution forming part of the public discourse. Most likely, many staff of the offices of Members of State and Territory Parliaments were quickly tasked with ascertaining whether they were subject to a provision equivalent to s.44(i) of the Constitution, to the effect that anyone under any acknowledgment of allegiance, obedience, or adherence to a foreign power, a subject or a citizen or entitled to the rights or privileges of a subject, or a citizen of a foreign power is incapable of being elected or sitting in Parliament.

In all States, save Victoria, they would have found some corresponding provisions, although certainly not ones as ‘brutal’ as those at the Commonwealth level.<sup>102</sup> This paper will consider the scope of and background to the New South Wales (NSW) equivalent to s.44(1), namely s.13A(1)(b) of the *Constitution Act 1902* [Constitution Act], noting that it can only take effect after a person has been elected to the NSW Parliament. Ultimately, the paper queries whether in the 21<sup>st</sup> century a statutory legacy of an age when Australian Britons regarded nervously anyone less Anglo-Saxon than themselves remains a useful indicator of the ability of Members of the NSW Parliament to effectively represent their electors. In doing so, in the absence of a corpus of decisions at State level, it will examine the development of High Court jurisprudence on the scope of s.44(i), which reasonably can be expected to be pivotal in any future consideration of the practical application of s.13A(1)(b).

### **The Foreign Allegiance Disqualification**

Under s.13A(1)(b) of the Constitution Act, a member of the NSW Parliament vacates his or her seat if that member:

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<sup>100</sup> The views expressed herein are my own and do not necessarily express those of the NSW Electoral Commission. This article is based on a paper given at the Electoral Regulation Research Network Seminar, ‘Who Can Sit?: Section 44 and Disqualification from the Federal Parliament’, NSW Parliament House, 17 October 2017.

<sup>101</sup> *Re Canavan* [2017] HCA 45. For a highly critical view of the decision, see J. Gans, *The Mikado in the Constitution*, <https://blogs.unimelb.edu.au/opinionsonhigh/2017/10/30/the-mikado-in-the-constitution-re-canavan-re-ludlam-re-waters-re-roberts-no-2-re-joyce-re-nash-re-xenophon-2017-hca-45/>

<sup>102</sup> See the Commonwealth Attorney General’s characterisation of the decision in *Re Canavan* as ‘almost brutal literalism’: <https://www.theguardian.com/australia-news/2017/oct/29/brutal-literalism-brandis-critiques-high-court-and-contradicts-pm-on-reform>

...takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power or does or concurs in or adopts any act whereby he (*sic*) may become a subject or citizen of any foreign state or power or become entitled to the rights, privileges or immunities of a subject of any foreign state or power.

The provision in these terms dates back to the *Imperial Act for the Government of New South Wales and Van Dieman's Land 1842*; it found its way into s.5 and s.26 of the *New South Wales New Constitution Act 1855*, which evolved—with little change<sup>103</sup>—into sections 19 and 34 of the *Constitution Act 1902*; and finally was moved to s.13A in the course of the constitutional changes implementing the reform of the NSW Legislative Council in 1978.

Immediately, the contrast with s.44(i) of the Australian Constitution is evident in that, at the Commonwealth level, a person may not nominate for election simply if they are 'entitled to the rights or privileges of a subject or a citizen of a foreign power', such that no action on the part of the aspiring Member is necessary. On the contrary, the entitlement to rights, or an existing allegiance to a foreign power does not disqualify a person from being elected as a Member of either House of the NSW Parliament; it is only if an elected Member does some act in acknowledgement of allegiance or to obtain such rights that the provision applies.

Given their shared constitutional evolution, it is hardly surprising that, with the exception of Victoria, other States retain similar disqualification provisions relating to dual allegiance to those in NSW. For example, in unicameral Queensland a member's seat becomes vacant if the Member 'takes an oath or makes a declaration or acknowledgement of allegiance, obedience or adherence to, or becomes an agent of, a foreign state or power'.<sup>104</sup> Equivalent provisions apply in Tasmania<sup>105</sup> and Western Australia.<sup>106</sup> South Australia at least provides clarity to the effect that acquiring or using a foreign passport or travel document is not sufficient for a dual allegiance.<sup>107</sup> Neither the Australian Capital Territory nor the Northern Territory has similar provisions.

## Eligibility for the NSW Parliament

Membership of the NSW Parliament ultimately derives from a successful bid for election, which begins with the statutory process of nomination. The *Parliamentary Electorates and Elections Act 1912* [*NSW Elections Act*]<sup>108</sup> sets very broad eligibility criteria for nominating as a candidate for either House of the NSW Parliament; every person enrolled as an elector in NSW as at 6.00 pm on the date of issue of the relevant writ is qualified, unless disqualified under the *Constitution Act* or the *NSW Elections Act*.<sup>109</sup> In NSW, a person is entitled to be enrolled for a district if the person:

- has attained 18 years of age;
- is an Australian citizen; and

<sup>103</sup> The *Constitution Act 1902* merely consolidated existing statutes relating to the Constitution of NSW which were brought into being before federation in 1901. For example, the legislative power conferred on the NSW Parliament by s.5 of the *Constitution Act 1902* was made expressly 'subject to the provisions of the Commonwealth of Australia Constitution Act'.

<sup>104</sup> Section 72(1)(d) of the *Parliament of Queensland Act 2001*.

<sup>105</sup> Section 34(b) of the *Tasmanian Constitution Act 1934*.

<sup>106</sup> Section 38(f) of the *WA Constitution Acts Amendment Act 1899*, specifically that where a member 'takes any oath or makes any declaration or acknowledgment of allegiance, obedience, or adherence, to any foreign Prince or Power, or does, concurs in, or adopts any Act whereby he [*sic*] may become a subject or citizen of any foreign State or Power, or whereby he may become entitled to the rights, privileges, or immunities of a subject or citizen of any foreign State or Power'.

<sup>107</sup> Sections 17(2) and 34(2) of the *Constitution Act 1934*

<sup>108</sup> While the *Electoral Act 2017* received the Royal Assent on 30 November 2017, none of its provisions have commenced as at January 2018.

<sup>109</sup> Sections 79(1) and 81B(1) respectively.

- has lived at an address in that district for at least one month before the enrolment.<sup>110</sup>

However, there remains in the *NSW Elections Act* an exception to the requirement for Australian citizenship: under s.22(2)(a) of that *Act*, candidates for election are not disqualified by virtue of any foreign allegiance provided they are a British subject enrolled to vote prior to 26 January 1984.<sup>111</sup> Since the 1998 High Court decision in *Sue v Hill*,<sup>112</sup> the interpretation of 'foreign power' as applicable to Members of Parliament is simply any polity or State recognised under international law, other than the Commonwealth of Australia. As Gerard Carney has noted, the *NSW Elections Act* raises an apparent inconsistency with the finding in *Sue v Hill* that British subjects owe allegiance to a foreign power for the purposes of s 44(i) of the Constitution. In keeping with the terms of s.13A(1)(b) of the *Constitution Act*, he suggests that that such British subjects are qualified to be elected but cannot later as members acknowledge their British allegiance in any way, for example by renewing their passport.<sup>113</sup>

Under s.25 of the *NSW Elections Act*, a person is not entitled to be on the electoral roll in NSW if the person:

- (a) is, because of being of unsound mind, incapable of understanding the nature and significance of enrolment and voting;
- (b) has been convicted of a crime or an offence, whether in New South Wales or elsewhere, and has been sentenced in respect of that crime or offence to imprisonment for 12 months or more and is in prison serving that sentence; or
- (c) is the holder of a temporary entry permit or is a prohibited immigrant under the Commonwealth *Migration Act 1958* as amended and in force for the time being.

Accordingly, anyone who falls within these exemptions is also incapable of being nominated for election to either House. However, Anne Twomey notes that the last-mentioned prohibition appears only to relate to a person who has lost residency rights in Australia and is unlikely to impact upon a person's entitlement to be a member of the NSW Parliament.<sup>114</sup>

### **Operation of s.13A(1)(b) of the Constitution Act**

In a 1982 article on disqualification provisions in the various State legislatures, Michael Pryles proposed that s.13A(1)(b) can be broken down into three possibilities leading to the disqualification of a member, namely:

- (1) the taking of any oath or the making of any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power - something less than the acquisition of foreign nationality or citizenship;
- (2) the doing or concurring in or adoption of any act whereby the member may become a subject or citizen of any foreign state or power – e.g., the act of applying for foreign citizenship; and

<sup>110</sup> Section 22(1)(a) of the *Parliamentary Electorates and Elections Act 1912*. In its 1998 Report, the NSW Parliament's Joint Standing Committee on the Independent Commission Against Corruption recommended that the Act be amended to require candidates to declare any foreign citizenship when nominating for election

<sup>111</sup> Section 22(2)(a) of the *Parliamentary Electorates and Elections Act 1912* mirrors the provisions of s 93(1)(b)(ii) of the *Commonwealth Electoral Act 1918*, introduced by the Hawke Labor Government in 1983 after negotiations with the Australian States as a grandfathering provision which maintained the voting rights of British citizens as at Australia Day 1984.

<sup>112</sup> (1998)165 CLR 178.

<sup>113</sup> Carney suggests that this effectively requires them to take out Australian citizenship to avoid the risk of disqualification: Gerard Carney, 'Foreign allegiance: a vexed ground of parliamentary disqualification', *Bond Law Review*, 11(2), 1999, p. 4.

<sup>114</sup> A Twomey, *The Constitution of New South Wales*. Leichhardt: The Federation Press, 2004, p 400.

(3) the doing or concurring in or adoption of any act whereby the member may become entitled to the rights, privileges or immunities of a subject of any foreign state or power.<sup>115</sup>

In its December 1998 Report on the *Inquiry into Section 13A Constitution Act 1902*, the NSW Parliamentary Committee on the Independent Commission Against Corruption [the ICAC Committee] set out the instances of Members' seats being vacated by s 13A or its equivalent in earlier forms of the *Constitution Act* (see Table 1).

**Table 1: Seats Vacated by Operation of s 13A (or its predecessors)<sup>116</sup>**

| Cause              | Legislative Council |             | Legislative Assembly |             |
|--------------------|---------------------|-------------|----------------------|-------------|
|                    | Incidents           | Most recent | Incidents            | Most recent |
| Absence            | 12                  | 1925        | 3                    | 1925        |
| Foreign allegiance | 0                   | NA          | 0                    | NA          |
| Bankrupt           | 1                   | 1932        | 7                    | 1931        |
| Public defaulter   | 0                   | NA          | 0                    | NA          |
| Conviction         | 1                   | 1940        | 0                    | NA          |
| Total              | 14                  | 1940        | 10                   | 1931        |

When a vacancy occurs in the NSW Legislative Assembly, the Assembly itself (if it is sitting) may declare the existence of a vacancy 'and the reason thereof';<sup>117</sup> when a vacancy occurs in the Legislative Council, the Governor responds by convening a joint sitting of the two Houses.<sup>118</sup> If the Assembly or the Council has a question regarding a vacancy, it can refer the matter to a single judge of the NSW Supreme Court sitting as the Court of Disputed Returns.<sup>119</sup> Thus, while s.13A acts of its own force, it is the Legislative Assembly or, in the case of a Legislative Council seat, the Governor, who declares the existence of the vacancy. If the relevant House chooses to refer the matter, the Court of Disputed Returns does so.

The jurisdiction of the Court of Disputed Returns would be to consider whether a relevant Member had in fact been disqualified. It would not have jurisdiction to review the merits of a declaration by the House that a seat was or was not vacant. If, however, a House made a declaration without any proper basis, such a declaration would be beyond its powers and could be nullified by the Supreme Court on application from the Member concerned. In *Armstrong v Budd*, the Court noted:

...this Court has a jurisdiction to determine whether in a particular case the House has exceeded the powers conferred upon it by the Constitution. In the exercise of that jurisdiction the Court will determine whether the limits upon the power of expulsion enjoyed by the House have been exceeded or not...The Court has power in a proper case to declare a resolution for expulsion null and void.<sup>120</sup>

<sup>115</sup> See M Pyles, 'Nationality Qualifications for Members of Parliament', *Monash University Law Review*, 8, 1982, p. 167.

<sup>116</sup> The table excluded office of profit and pecuniary interest disqualifications, and the ICAC Committee noted also that it did not include Members who opted to resign in circumstances likely to 'attract the operation of s.13A', such as five-time Premier, Sir Henry Parkes, who twice resigned from Parliament due to financial embarrassment. New South Wales Joint Parliamentary Committee on the Independent Commission Against Corruption, *Inquiry into Section 13A Constitution Act 1902*, p 4. <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5464/Committee%20Report%2001%20December%201998%20-%20Inquiry%20into%20G.pdf>

<sup>117</sup> Section 70 Parliamentary Electorates and Elections Act 1912.

<sup>118</sup> Section 22D Constitution Act 1902.

<sup>119</sup> Sections 175B and 175H Parliamentary Electorates and Elections Act 1912.

<sup>120</sup> The Supreme Court was considering the expulsion of the Hon Alexander Armstrong MLC, after he had been found by a judge to have conspired to produce false evidence and contemplated attempting to bribe a Supreme Court judge: (1969) 71 SR(NSW) 386 at 398.

In the abovementioned ICAC Committee Report, the Committee expressed its preference that s.13A continues to operate of its own force, but that jurisdiction to declare that a vacancy be given to the Court of Disputed Returns on the application of any elector. This proposal has the advantages that:

- disqualification under s 13A remains a question of law rather than politics;
- it is administratively efficient; a clear case being dealt with by resolution of the House;
- it provides judicial expertise for the determination of difficult cases; and
- it maintains public confidence in Parliament by assuring the possibility of judicial determination regarding the base standards of what is acceptable behaviour for Members as set in law by the Parliament.<sup>121</sup>

## From Subjects to Citizens

The potential impact of s.13A(1)(b) of the *Constitution Act* places it at the intersection of the development of understandings of citizenship, allegiance, and qualifications of both electors and elected members within Australia. The terminology ‘allegiance, obedience or adherence to any foreign prince or power’ has justly been criticised as archaic. However, it simply reflects its origins in an Australian colony populated by British subjects jealous of that status; in 1902 ‘foreign’ was simply equated to ‘non-British’.<sup>122</sup>

In the British metropole, from 1700 the *Act of Settlement* defined the qualifications for membership of the Westminster Parliament partly by distinguishing between natural born subjects and those who were naturalised:

...no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust, either civil or military.<sup>123</sup>

With the expansion of the British Empire, the UK *Aliens Act 1844* provided that a naturalised person became entitled to all of the rights of a natural born subject, except those of serving as a Privy Councillor or Member of Parliament.<sup>124</sup> From 1870 onwards, any male born a British subject, but who became a foreign citizen (including by descent) could sit in Parliament notwithstanding that dual nationality.<sup>125</sup> By contrast, a British subject who was voluntarily naturalised as a foreign citizen by reason of some act after his birth could not sit in Parliament, as they ceased to be a British subject upon foreign naturalisation.

<sup>121</sup> ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*, p 5,

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5464/Committee%20Report%2001%20December%201998%20-%20Inquiry%20into%20G.pdf>

<sup>122</sup> I would like to acknowledge my considerable debt to the submission of the Commonwealth Attorney General in the recent Commonwealth disqualification matters before the High Court. In doing so, I note the observation of the Amicus Curiae brief that ‘[i]nteresting as the Commonwealth’s exegesis of the historical antecedents to s 44(i) is, it is of limited to no relevance to the resolution of the present question of construction’: G .Kennett SC, and M. Lim, *Re Senator the Hon Matthew Canavan, Re Senator the Hon Fiona Nash, Re Senator Nick Xenophon, References under s 376 of the Commonwealth Electoral Act 1918 (Cth) Annotated Submissions of the Amici Curiae*, [http://www.hcourt.gov.au/assets/cases/03-Canberra/c11-2017/Canavan\\_KennettSubs.pdf](http://www.hcourt.gov.au/assets/cases/03-Canberra/c11-2017/Canavan_KennettSubs.pdf)

<sup>123</sup> Although the Act of Settlement 1701 was continued in its application in NSW by the *Imperial Acts Application Act 1969*, it would not appear to have been by implication repealed by the Imperial laws applying expressly to NSW and the allegiance of the Members of its Legislature. A. Twomey, *Constitution of New South Wales*, p 4, referencing G.J. Linden.

<sup>124</sup> *Aliens Act 1844* (Imp), 7 and 8 Vict, c 66, s.6.

<sup>125</sup> See s.4 of the *Naturalisation Act 1870* (UK).

The liberalisation of the requirements for parliamentary qualification in the United Kingdom was preceded by developments in the Australian colonies. As early as 1842, both natural born and naturalised subjects of Queen Victoria were qualified to sit in the NSW Legislative Council.<sup>126</sup> Shortly after, the *Naturalisation Act 1847* (Imp) empowered colonial legislatures to regulate such entitlements 'within the respective limits of such colonies or possessions respectively'.<sup>127</sup> However, when electoral legislation was first developed under the Australian Federation, it continued earlier, divisive, concepts. The *Commonwealth Franchise Act 1902* limited eligibility to vote in federal elections to 'natural born or naturalized subjects of the King' but still excluded a wide range of Indigenous subjects of King Edward VII (except New Zealand Maori).

The interaction between State and Commonwealth consideration of dual allegiance is highlighted by the fact that one submission to the NSW ICAC Committee Inquiry suggested the term 'foreign prince' was originally aimed at Roman Catholics loyal to the Pope, a position argued in the challenge brought under s.44(i) of the Constitution to the election of a Catholic to the House of Representatives at the 1949 federal Election. In *Crittenden v Anderson*,<sup>128</sup> the respondent's election was challenged on the basis that, as a Catholic, he was disqualified for being 'under acknowledgment of adherence, obedience and/or allegiance to a foreign power', namely, the 'Papal State'. Fullagar J rejected the challenge on the basis that it amounted to a religious test, which s 116 of the Constitution prohibited as a 'qualification for any office or public trust under the Commonwealth'. Moreover, his Honour drolly found that no investigation of the Papal States as a foreign power under the Lateran Treaty of 1929 by which Italy recognised the Vatican City State could 'possibly be relevant to the election of a Member of the House of Representatives for Kingsford Smith'.<sup>129</sup>

Following the 1992 resignation from Parliament of former Prime Minister Bob Hawke, the High Court had cause to consider the provisions of s.44 of the Constitution, when Independent candidate Phil Cleary won the ensuing by-election for the seat of Wills. The decision of *Sykes v Cleary*<sup>130</sup> is more widely known for the finding that, as a permanent secondary school teacher in the Victorian public-school system, Cleary held an 'office of profit under the Crown' which disqualified him from election to the House of Representatives, due to s.44(iv) of the Constitution.

While the focus may have been on Cleary's eligibility, two other candidates in the Wills by-election were also disqualified, as the Court found that although after emigrating they had become Australian citizens, they had not 'taken reasonable steps' to renounce their birthplace foreign citizenship.<sup>131</sup> The Court found that, although Mr Bill Kardamitsis and Mr John Delacretaz easily could have renounced their respective Greek and Swiss citizenships, neither had taken any steps to do so. Brennan J stressed the importance of the simple existence of dual citizenship, rather than any positive actions arising from it, noting that there are 'few situations in which a foreign law, conferring foreign nationality ... is incapable in fact of creating

<sup>126</sup> An Act for the Government of New South Wales and Van Diemen's Land 1842 (Imp) 5 and 6 Vict, c 76, s.8.

<sup>127</sup> *Naturalisation Act 1847* (Imp) 10 and 11 Vict, c 83, s.1. However, that territorial limitation resulted in the situation that 'a Frenchman naturalised in New Zealand was a British subject there, but a Frenchman in England'. R Karatani, cited in *Submission of the Attorney General*, para 20.

<sup>128</sup> Unreported decision of Fullagar J on 23 August 1950, noted in (1977) 51 ALJ 171. A similar challenge, *Sarina v O'Connor*, was tabled in the House of Representatives by the Clerk on 20 November 1946 but withdrawn before proceeding to the High Court. Sarah O'Brien, *Dual Citizenship, Foreign Allegiance and s 44(i) of the Australian Constitution*, Department of the Parliamentary Library, 1992. <http://www.aph.gov.au/binaries/library/pubs/bp/1992/92bp29.pdf>

<sup>129</sup> (1977) 51 ALJ 171. For an exultant view of the decision, see 'Catholic M.H.R. wins case', *Catholic Weekly*, 31 August 1950, <https://trove.nla.gov.au/newspaper/article/146737170>

<sup>130</sup> (1992) 176 CLR 77.

<sup>131</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 25 per Brennan J.

a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power'.<sup>132</sup>

The *Sykes v Cleary* decision piqued interest in the potential impact of s.13A(1)(b) of the Constitution Act. Thus, in a response to a question from Labor MLC Franca Arena, Liberal Attorney General John Hannaford advised the NSW Legislative Council that:

...the view of the Crown Solicitor is that the member would have to swear allegiance to a foreign power after becoming a member of Parliament in New South Wales in order to be disqualified from continuing as a member of this Parliament. However, ... a failure to swear allegiance [to the Queen] may be a matter of concern which could affect the member's ability to remain in the Parliament.<sup>133</sup>

Comparing the NSW and Commonwealth statutory regimes, the Attorney General noted that under the NSW Constitution the critical time was after a member's election, not the time of candidature. He therefore concluded that '[i]f a person swears allegiance to the Queen upon being elected, and has not sworn allegiance to any other power, that person would remain a member of Parliament'.<sup>134</sup>

### Cutting the Crimson Thread of Kinship

In 1997, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that a referendum be held to make the following changes to the Constitution:

- delete subsection 44(i) of the Constitution;
- insert a new provision requiring candidates and members of parliament to be Australian citizens; and
- empower parliament to enact legislation determining the grounds of disqualification of members of parliament in relation to foreign allegiance.<sup>135</sup>

The following year, in *Sue v Hill*, two electoral petitions were brought against the election to the Senate in 1998 from Queensland of Ms Heather Hill, on the ground that she was at the time of her nomination a citizen of the United Kingdom and hence a subject of a 'foreign power' within the meaning of s.44(i). In laying the groundwork for this conclusion, in the 1988 decision of *Nolan v Minister for Immigration & Ethnic Affairs*, Brennan J observed that the denotation of 'alien' had changed since Federation to include British subjects, as a result of 'the emergence of Australia as an independent nation, the acceptance of the divisibility of the

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<sup>132</sup> *Sykes v Cleary* (1992) 176 CLR 77 at 113 per Brennan J.

<sup>133</sup> Hon J P Hannaford MLC, Attorney-General, Legislative Council *Hansard*, 26 November 1992. Note that swearing allegiance does not of itself constitute a nationality requirement, as an alien can take the oath of allegiance: *In re Ho* (1975) 10 S.A.S.R. 250, 254; *Kahn v Board of Examiners of Victoria* (1939) 62 CLR 422 at 430-4; *Borensztein v Board of Examiners* [1961] VR 209 at 211.

<sup>134</sup> Hon J P Hannaford MLC, Attorney-General, Legislative Council *Hansard*, 26 November 1992

<sup>135</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Aspects of Section 44 of the Australian Constitution - Subsections 44(i) and (iv) I, August 1997 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_representatives\\_Committees?url=/laca/inquiryinsec44.ht](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=/laca/inquiryinsec44.ht). The Senate Standing Committee on Legal and Constitutional Affairs had also recommended deleting s 44(i) in its 1981 Report *The Constitutional Qualifications of Members of Parliament*. [https://www.aph.gov.au/parliamentary\\_business/committees/senate/legal\\_and\\_constitutional\\_affairs/completed\\_inquiries/pre1996/constitutional/index](https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/pre1996/constitutional/index). On 28 November 2017, Prime Minister Turnbull referred matters relating to Section 44 of the Constitution to the Joint Standing Committee on Electoral Matters for inquiry and report. [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters/Inquiry\\_into\\_matters\\_relating\\_to\\_Section\\_44\\_of\\_the\\_Constitution](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Inquiry_into_matters_relating_to_Section_44_of_the_Constitution)

Crown which was implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship'.<sup>136</sup>

The effluxion of time had therefore nullified Attorney-General Garfield Barwick's declaration in 1959 that Australian citizenship was the only national status which people had in relation to Australia, but, 'by dint of our relationship to the Queen and to the British Commonwealth of Nations', Australian citizens were also British subjects.<sup>137</sup> After almost 40 years, the High Court in *Sue v Hill* finally put to rest the 'common code concept' which had once sheltered all Commonwealth citizens 'under the umbrella of British nationality'.<sup>138</sup>

### **Inquiry of the NSW Joint Standing Committee on the Independent Commission Against Corruption**

In 1995, the NSW Independent Commission Against Corruption (ICAC) investigated the circumstances surrounding the payment of a parliamentary pension to Mr P.M. Smiles, the former Member for North Shore, which highlighted that attention needed to be given, *inter alia*, to matters relating to the criteria for the vacation of a seat in either House. The ICAC determined that these matters should be the subject of further consideration and a supplementary report.<sup>139</sup>

In response to recommendations made by the ICAC, each NSW House of Parliament referred a number of issues to the ICAC Committee, including general questions relating to s.13A of the Constitution Act. The ICAC Committee noted that it was the first to consider these disqualifications since the *Report from the Select Committee on the Proposed New Constitution* in 1852 had decided that:

With a view to prevent corruption, and maintain purity of election in the Assembly, and to preserve it, as far as possible, from sectarian influences, it has been deemed expedient to introduce those leading grounds of disqualification which exist in the Parent Country...<sup>140</sup>

Almost twenty years later, the ICAC Committee's report remains the most thorough examination of the issues surrounding foreign allegiance and the NSW Parliament. The ICAC Committee felt that conduct which may conceivably, but not necessarily, be incompatible with being a Member was better dealt with by the Houses' discretion rather than the inflexible application of the law. As the stark terms of s 13A were unsuitable to borderline instances, it was more appropriate that difficult or ambiguous cases should be left to the Houses' discretionary common law power to discipline or expel.<sup>141</sup> The ICAC Committee ultimately concluded that:

The purpose of disqualification provisions is to ensure that electorates may maintain confidence in their candidates and that the Parliament is protected from disrepute by providing base standards of what is necessary for an elected representative. As disqualification provisions nullify a decision of the electorate,

<sup>136</sup> (1988) 165 CLR 178 at 185-186.

<sup>137</sup> Letter from Department of External Affairs to Australian Diplomatic Posts, 12 January 1962, A1838/2, 557/2 part 3, NAA.

<sup>138</sup> See Hon Stewart West MP, Minister for Immigration, introducing amendments to the Citizenship Act, *Commonwealth Parliamentary Debates*, Vol 134, 7 December 1983.

<sup>139</sup> NSW ICAC, *Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles, Second Report*, April 1996. [http://www.icac.nsw.gov.au/dmdocuments/pub2\\_41i.htm](http://www.icac.nsw.gov.au/dmdocuments/pub2_41i.htm)

<sup>140</sup> Quoted in ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*, p. v.

<sup>141</sup> In the NSW Legislative Assembly, this power is expressed by Standing Order 294, which provides that 'A Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the seat declared vacant'. Standing Order 295 provides that consideration of an expulsion may be deferred and the Member suspended pending an outcome of a criminal trial.

they should only apply in cases so extreme that disqualification from Parliament is necessary for community confidence in Parliament to be maintained.<sup>142</sup>

Therefore, the provisions of s.13A of the *Constitution Act* should:

- only apply to cases where a Member clearly would forfeit the electorate's confidence;
- be clear, precise and unambiguous in its terms; and
- only operate on circumstances which have occurred or come to light after the election of the Member.<sup>143</sup>

The ICAC Committee's recommendation for resolving issues of s.13A disqualification was that the provision continue to operate of its own force, with resulting vacancies being declared by the House, and electors be given the right to make an application to the Court of Disputed Returns for the declaration of a vacancy arising from the operation of the section. Appropriate mechanisms would be required to discourage spurious and vexatious claims.<sup>144</sup>

Fundamentally, the ICAC Committee was concerned that the main detriment of s.13A(1)(b) was that its lack of clarity could result in 'a Member unwittingly being disqualified for action which does not conflict with the interest of the State or his or her role as a Member'.<sup>145</sup> Ultimately, it recommended the repeal of the disqualification for two reasons, namely that foreign allegiance hardly posed a serious conflict of interest; and that disqualification was too grave a penalty, especially when it arose in innocent circumstances.<sup>146</sup> This proposal has not been implemented to date.

## Conclusion

The object of preventing divided loyalties is, undoubtedly, a valid public policy aim. It is one which goes to the heart of public confidence in the ability of Members of Parliament to represent the interests of their electorate and of the State, neatly defined by political scientist Campbell Sharman as 'ensuring that members of Parliament have a clear and undivided loyalty to the political community of Australia'.<sup>147</sup>

Arguably, in the globalised world in which politics operate, a better approach would be not to simply focus on the type of allegiance symbolised by a rarely-used foreign passport, but on the matrix of business dealings in which Members of Parliament regularly are involved. In the current climate—in which concerns as to the influence of foreign business interests in the Australian political sphere could apparently only result in the voluntary resignation of NSW Labor Senator Sam Dastayari due to internal party pressure<sup>148</sup>—arguments for accountability

<sup>142</sup> ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*, pp. 6-7.

<sup>143</sup> ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*, pp. 6-7.

<sup>144</sup> The ICAC Committee also recommended that the Government cover the costs of any Member defending such an action. ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*.

<sup>145</sup> ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*, p. 7.

<sup>146</sup> ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*, pp. 26-29. As Professor Twomey notes, sections 7A(1)(c) and (d) of the Constitution Act purport to entrench provisions with respect to the persons capable of being elected or of sitting and voting as Members of either House of Parliament, or any provision with respect to the circumstances in which the seat of a Member of either House of Parliament becomes vacant. However, she concludes that this purported entrenchment is unlikely to be effective, as a law amending a disqualification provision is unlikely to trigger the application of s.6 of the *Australia Acts 1986*. Therefore, repealing s.13A(1)(b) without a referendum remains an option.

<sup>147</sup> Associate Professor Campbell Sharman, *Submission to the Commonwealth Parliament's Standing Committee on Legal and Constitutional Affairs*, p. S79.

<sup>148</sup> Stephanie Peatling and Fergus Hunter, 'China Scandal: Embattled Labor Senator Sam Dastayari Resigns from Parliament', *Sydney Morning Herald*, 12 December 2017. <https://www.smh.com.au/politics/federal/china-scandal-embattled-labor-senator-sam-dastayari-resigns-from-parliament-20171211-h02ddn.html>

and transparency by way of enforceable Codes of Conduct and independent bodies to publicly scrutinise disclosures of pecuniary interests will inevitably grow stronger.

Perhaps the recent High Court decisions on disqualification under s.44 of the Constitution might be the catalyst for sufficient political interest in the potential operation of s.13A(1)(b) of the *NSW Constitution Act* for the ICAC Committee's findings to be revisited, so that a contemporary, nuanced approach to the possibility of divided loyalties for members of the NSW Parliament can be crafted, in which the broadest approach to 'clear and undivided loyalty' to the political community will be adopted and enforced.

## Delegated Legislation and the Democratic Deficit: The Case of Christmas Island<sup>149</sup>

**Kelvin Matthews**

PhD candidate in the School of Arts and Sciences, University of Notre Dame Australia (Fremantle Campus)

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### Introduction

This article argues that the current delegated applied legislation regime on Christmas Island is undemocratic. In doing so, it will also discuss how the applied delegated legislation of Western Australian laws to Christmas Island is complex and unworkable and excludes the community from having input into the laws that govern their daily lives. The key underlying principle of democratic representation, that communities' elect individuals to represent them and help make binding decisions, has been cemented in the liberal democratic tradition for centuries. Hanna Pitkin points out that representative democracy has usually been adopted instead of the direct democracy alternative because of the impossibility of assembling large numbers of people in a single place. Therefore, while representation is a substitute for direct participation, it is a preferable substitute.<sup>150</sup> Michael Jackson similarly argues that direct democracy is difficult in large communities and widespread citizen participation in politics is hard to achieve, so representative democracy has evolved as a result.<sup>151</sup>

The definition of representative democracy must include the notion that citizens have genuine choices among alternative candidates at the time of an election. As Cheryl Saunders notes, in a democracy the people are governed by their representatives, and democratic rights are of vital importance. The most obvious of these is the right to vote.<sup>152</sup> M. Harvey *et al*, among many others, point out that responsible government in Westminster systems means that government functions are carried out or overseen by ministers who are responsible to the electorate via their accountability to Parliament.<sup>153</sup> As Martin Drum and John Tate argue, the concept of representative and responsible government implies that the government has the right to make decisions that affect citizens because those citizens have elected them to undertake that role. These basic principles underlie democratic political systems, including Australia's.<sup>154</sup>

These fundamental democratic elements are absent on Christmas Island. Instead, a specific governance model exists in which the majority of legislation applicable to the Island is delegated by Australia's Commonwealth Government to the Western Australian State Government. This is despite the fact that Christmas Islanders do not vote in Western Australian state elections. Under an arrangement with the Commonwealth, most key public services on Christmas Island are delivered by the Western Australian Government through Service Delivery Agreements (SDAs). This article will explain how the current situation has developed, what it means in practice, and how this has created an Australian jurisdiction in which a 'democratic deficit' exists.

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<sup>149</sup> Kelvin Matthews spent six and half years as the Chief Executive Officer for the Shire of Christmas Island until October 2016.

<sup>150</sup> H. Pitkin, *The Concept of Representation*. Berkeley, The University of California Press, 1967, p. 191.

<sup>151</sup> M. Jackson, 'Democratic Theory and Practice' in R. Smith and L. Watson (eds), *Australian Politics*. Sydney: Allen and Unwin, 1989, p. 33.

<sup>152</sup> C. Saunders, *It's Your Constitution*. Leichhardt: The Federation Press, 2003, p. 81.

<sup>153</sup> M. Harvey, M. Longo, J. Ligertwood and D. Babovic, *Constitutional Law*, Sydney, Lexis Nexis, 2010, p. 63.

<sup>154</sup> M Drum and J. Tate, *Politics in Australia: Assessing the Evidence*, Melbourne, Palgrave MacMillan, 2012, pp. 112, 124, 134.

## The Christmas Island Context

Christmas Island is located in the Indian Ocean, approximately 2650 km northwest of Perth, Western Australia, 360 km south west of Java, Indonesia. It is 980 km north east of the Cocos (Keeling) Islands, which with Christmas Island form the Australian non self-governing external Indian Ocean Territories. Christmas Island was developed for its phosphate resources, with the Clunies Ross family and then the British Phosphate Commissioners mining the Island using indentured 'coolie' labourers brought in from China, Malaysia and Singapore. In 2011, the Island's population was approximately 2072, with a cultural composition and character that reflects its labour history. Ethnic Chinese and Malaysians comprised approximately 85 percent of the population, with those of European and other descents making up the remaining 15 percent.<sup>155</sup>



Figure 1. Google map showing the location of Christmas Island

The history of Christmas Island tells three key stories. The first is the economic and social dominance of phosphate mining since the late nineteenth century, which continues to the present day. The second is the relatively recent introduction of Australian conditions to the Island, despite the formal annexure in 1958. The third is the unique culture created by the remarkable social composition of the community and its unusual administrative and institutional arrangements.

## The Development of the Christmas Island Governance and Legislative Framework

The historical social, economic and legislative arrangements for Christmas Island amounted to its governance by the British as a dominion of the Empire. The transfer of rights in October 1958 from the British Straits Settlement (Singapore) authority by virtue of section 122 of the Australian Constitution provided a limited form of sovereignty.<sup>156</sup> Australia has asserted sovereignty over Christmas Island since it was deemed by the Queen and accepted by the

<sup>155</sup> Australian Bureau of Statistics, *2011 Census Data: Expanded Community Profile*, Table X01f.

<sup>156</sup> Joint Standing Committee on the National Capital and External Territories, *Current and Future Governance arrangements in the Indian Ocean Territories*. Canberra: Parliament of the Commonwealth of Australia, May 2006, p. 8.

Commonwealth as a Territory of Australia.<sup>157</sup> Neither the excision of Christmas Island from the Colony of Singapore nor its transfer to Australia involved any consultation with the people living on the Island. This lack of consultation extended to decisions about applicable laws for the Island, as has been noted in several Inquiry Reports of the Joint Standing Committee on the National Capital and External Territories (JSCNET).<sup>158</sup>

The Commonwealth Sweetland Royal Commission Inquiry Reports of 1980 and 1982 provided a critique of past discriminatory practices by the Government towards the Christmas Island community. These practices contributed to the community's desire for equal recognition and participation in all affairs of the Island. Writing about the political, industrial and social conditions on Christmas Island between the period of transfer to Australia in 1958 and the implementation of the *Islands in the Sun Report* in 1992, Les Waters notes that Recommendation 14 of the Sweetland Report refers to residents of Christmas Island being able to qualify for citizenship in exactly the same manner as foreign nationals who took up permanent residence on the Australian mainland, regardless of their original ethnicity.<sup>159</sup> Following the adoption of the majority of the Sweetland Report's recommendations, Christmas Islanders were afforded full formal citizenship rights. In 1991, the Parliament of the Commonwealth of Australia's House of Representatives Standing Committee on Legal and Constitutional Affairs reviewed the legal regimes of all Australia's External Territories. Both Indian Ocean Territories Islands achieved representation in the Australian Commonwealth, and with it the right to become Australian citizens. As part of this citizenship status, they could vote federally for a Northern Territory House of Representatives seat (currently the electorate of Lingiari) and for the Senate as Northern Territory voters.

The *Islands in the Sun* Parliamentary Inquiry into the legal regimes of Australia's External Territories released in March 1991 envisaged the introduction to the Island of an applied legislative system within a broader package of initiatives and actions to ensure that laws were applied in a manner acceptable to the Island's community. It was evident to members of the Inquiry that the laws of Christmas Island were anachronistic, incomplete and not readily identifiable. The prospect of retaining the status quo was quite untenable.<sup>160</sup> Some political and administrative reforms occurred as a result. The *Territories Law Reform Act 1992* amended the *Christmas Island Act 1958*, whose provisions had been largely based on the laws of Singapore. The new Act represented a major advance for the Territory.<sup>161</sup> It included provisions in the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1955*, which meant that Western Australian laws applied in the Territories as if they were Australian Government laws.

Crucially, there was no suggestion in the *Islands in the Sun Report* that the preferred option of applying the Western Australian legislative regime to Christmas Island (and the Indian Ocean Territories more generally) would disenfranchise members of the Christmas Island community, removing their democratic representation and voting rights in the state of Western Australia, where the applicable laws would be made. The enacted recommendations of the *Islands in the Sun Report* persist today, with little modification or amendment some 25 years after their introduction. The resulting system of applied legislation is complex. It creates difficult interactions between different pieces of legislation, and uncertainty in the administration of that legislation.

<sup>157</sup> Commonwealth of Australia, *Islands in the Sun*. Parliamentary Inquiry Report on the Governance of Christmas Island. Canberra: Commonwealth of Australia, 1991, p. 41.

<sup>158</sup> Joint Standing Committee on the National Capital and External Territories, Review of the Annual Reports of the Department of Transport and Regional Services and the Department of the Environment and Heritage. Canberra: Parliament of the Commonwealth of Australia, 2004, p. 10.

<sup>159</sup> L. Waters, *The Union of Christmas Island Workers*. St. Leonards: Allen and Unwin, 1983, p. 147.

<sup>160</sup> Commonwealth of Australia, *Islands in the Sun*, p. 195.

<sup>161</sup> E. Heng and V. Forbes, 'Christmas Island: Remote No More', in D. Rumley, V. Forbes and C. Griffin (eds), *Australia's Arc of Instability: The Political and Cultural Dynamics of Regional Security*. Dordrecht: Springer, 2006, p. 74.

## The Democratic Deficit and Delegated Legislation

Delegated legislation refers to laws made by persons or bodies to whom parliament has delegated law-making authority. Where Acts are made by parliament, the principal Act can make provision for subsidiary legislation such as regulations to be made and will normally specify who has the power to make these. Accordingly, delegated legislation can only exist in relation to an enabling or principal Act. In the case of Christmas Island, section 8A of the *Christmas Island Act 1958* allows for delegation by the Commonwealth Minister for the application of Western Australian laws. That is, subject to the Act, relevant provisions of existing and future laws of Western Australia come into force in the Territory. This could be interpreted as a process by which the Commonwealth has delegated its legislative power to the Western Australian Government, so that Western Australian legislation can be applied to the Christmas Island community. This process does not imply that the Commonwealth has delegated its entire law-making process for the Island to the Western Australian Government, given the provisions in the (Commonwealth) Act that identify where Commonwealth law prevails, particularly in regard to any inconsistencies between Western Australian and Commonwealth law. Nonetheless, the process does not have democratic legitimacy because Christmas Islanders are excluded from the democratic process of voting for members of the Western Australian Parliament, from among whom the ministers who apply the legislation are drawn.

The Western Australian Joint Standing Committee on Delegated Legislation exists to scrutinise subsidiary legislation (such as local laws). The Western Australian Minister for Local Government may direct local governments to provide to Parliament copies of local laws that they have made, along with any explanatory or other related material.<sup>162</sup> The *Western Australian Local Government Act 1995* therefore requires a local government to submit the local laws it has adopted for review and gives the Committee the power to render the local laws inoperable. Under the Act, the Committee may also amend or insert provisions in local laws if they wish. This occurs despite the fact that Island residents elect the Shire of Christmas Island, and the Committee consists of elected Western Australian parliamentarians for whom Island residents cannot vote. A democratic deficit therefore lies in the fact that Western Australian laws apply despite there being no Island representation in the Western Australian Parliament. For the purpose of clarification, the terminology of 'Local Laws' is defined and prescribed in accordance with Division 2, Subdivision 1 of the *Western Australian Local Government Act 1995*. This states that a local government may make local laws that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for a local government to perform any of its functions under the Act.

There are also disallowance provisions in the relevant Commonwealth legislation, such as the *Territories Law Reform Act 1992* and the *Christmas Island Act 1958* (as amended 2010); however, these provisions have rarely been used. In effect, the Commonwealth has substantially delegated its legislative making power to the state of Western Australia without any ensuing democratic representation. The Western Australian Parliament purports to have the legislative right to amend or veto democratically adopted local laws on Christmas Island, despite the fact that Christmas Islanders cannot vote for Western Australian parliamentarians. Responsible government means that all governments must be accountable for their actions to the people who have elected them, and the traditional means by which they are held accountable is through Parliament, which is the link between government and the people. Without the people's collective consent, the government is not legitimate.<sup>163</sup> Comparative overseas experience also makes it clear that the democratic legitimization of secondary

<sup>162</sup> Western Australian 1995 Local Government Act, s 312 (7).

<sup>163</sup> Drum and Tate, *Politics in Australia*, p. 112.

legislation can also be secured by involving the public in its approval, at least indirectly through elected representatives.<sup>164</sup>

In the case of Christmas Island this has never occurred. On this basis, the delegated legislation regime applied by the Western Australian Government has no democratic legitimacy. The arrangement between the Commonwealth and the Western Australian Government excludes the fundamental principles of responsible government and representative democracy. The process of Western Australian parliamentary committees overriding local laws is acceptable and reasonable for mainland Western Australian local governments in accordance with legislative accountability. However, this is an undemocratic process for the Indian Ocean Territories' local governments because it requires Western Australian parliamentary scrutiny without any democratic representation by the Islanders. The *Islands in the Sun* Report pointed out that, to the greatest degree possible, citizens should be empowered to participate in decision making, particularly on issues that affect their day to day lives.<sup>165</sup> In this regard, the accountability of the Western Australian Parliament and the elected members who comprise it are accountable to the Western Australian electors who voted for them, but they are not accountable to Christmas Islanders, who are presently denied the right to vote for them. Clause 7.38 of the recent Commonwealth Joint Standing Committee on National External Territories (JSCNET) 2016 *Final Inquiry Report* reinforces this point, noting that the Indian Ocean Territory residents are subject to applied legislation from Western Australia, yet they have no representative in the Western Australian Parliament.<sup>166</sup>

These legislative and governance arrangements mean the Indian Ocean Territories are different from the rest of Australia. The lack of a regional level government means that residents have less access to parliamentarians and ministers and face increased complexity and representation costs compared to other communities. The decentralised administrative processes and the variety of service arrangements further complicate matters, because the delivery of state services is not the core business of Australian Government agencies. This is the primary reason the Commonwealth has 'outsourced' state service type functions through Service Delivery Agreements (SDAs). The *Islands in the Sun* Report recommended that the community of Christmas Island be consulted regarding the effects that the Western Australian legislation has on them. In particular, Recommendation Seven was intended to ensure that the community was consulted as much as possible through the Shire of Christmas Island. The Shire was to have direct access to the appropriate Commonwealth Minister to provide a review mechanism on behalf of the Christmas Island community to the Commonwealth.<sup>167</sup> Accordingly, in 1993 the Commonwealth funded the establishment of a permanent law reform officer within the (newly created) Shire of Christmas Island. This role was created to facilitate Community Consultative Committee (CCC) meetings, distribute information to the community, and collate feedback for the Commonwealth.

The CCC became the focal point for consultation about the delegated applied legislative system, and Service Delivery Agreements (SDAs) were the mechanism developed to allow state services to be delivered by relevant Western Australian government agencies.<sup>168</sup> Under this system, impact statements are prepared that include lists of suspended and repealed laws, and the Commonwealth is required to publish Annual Reports in regard to the progress of the delegated applied legislation regime and the performance of the SDAs. The approach adopted is resource intensive, because each service requires an agreement with the Western

<sup>164</sup> H. Pünder, 'Democratic Legitimization of Delegated Legislation—A Comparative View on the American, British and German Law', *International and Comparative Law Quarterly*, 58(2), 2009, p. 353.

<sup>165</sup> Commonwealth of Australia, *Islands in the Sun*, p. 202.

<sup>166</sup> Joint Standing Committee on National Capital and External Territories (JSCNCET), *Final Inquiry Report: Economic Development and Governance*, Canberra, Commonwealth of Australia, March 2016, p. 134.

<sup>167</sup> Commonwealth of Australia, *Islands in the Sun*, pp.57-58.

<sup>168</sup> Department of Infrastructure and Regional Development, *Annual Report 2014/15*, Canberra, Commonwealth of Australia, 2015.

Australian provider that includes monitoring and performance reporting processes. The service providers must also consult with Christmas Island community members to ensure that the providers understand the requirements and the environment in which the services are to be delivered. These arrangements are complex, costly and inefficient compared with the current structures for the states and even the Northern Territory.

The Commonwealth now rarely consults formally with the community of Christmas Island. The current situation ignores the original intention of the process, as well as the recommendations of the *Islands in the Sun Report* and subsequent JSCNET Inquiry Reports that the Commonwealth and the Western Australian Government were to consult regularly with the community about the impact of the delegated applied legislation and SDAs. Notwithstanding this, the Shire of Christmas Island has retained and funded the CCC to carry out its functions, as it is the only legitimate mechanism available to the community to consider the various effects of the Western Australian delegated legislation regime.

It should be noted that Christmas Island is not alone in this regard. The Commonwealth has recently enforced a similar delegated legislative regime for the governance of Norfolk Island as a response to JSCNET inquiries. This includes applying a governance model to Norfolk Island that is identical to Christmas Island: it applies delegated legislation from the NSW State Government but does not allow Norfolk Islanders the democratic right to vote in the NSW election process. Norfolk Islanders are represented federally in the Australian Capital Territory (ACT), with whom it can be argued that they have no 'community of interest,' in a similar sense that Christmas Islanders have no community of interest with Northern Territory residents.<sup>169</sup>

### Alternative Governance Options

While the current arrangements are unlikely to be found unlawful or unconstitutional, they create a democratic deficit for Christmas Islanders because Christmas Islanders cannot vote in Western Australian elections. What are alternative governance possibilities that would remove this democratic deficit? Some of these alternative options were originally raised in the *1992 Islands in the Sun* report and have subsequently been discussed in JSCNET reports. Options in the 1992 report included (i) retaining the current governance arrangement, (ii) incorporating the Island into Western Australia or the Northern Territory, or (iii) enhancing the powers of the Christmas Island Council by giving it greater responsibilities for specific domestic laws.<sup>170</sup> The feasibility of these options is unclear. Being incorporated with the state of Western Australia, for example, would be constitutionally complicated, as was noted in JSCNET's 2016 Report. JSCNET dismissed this proposal, given the complexities of Section 123 of the Australian Constitution in regard to Western Australia, although JSCNET did look favourably on the possibility of incorporation of Christmas Island in the Northern Territory.<sup>171</sup>

The options in the original *Islands of the Sun Report* did not include Christmas Island applying to the United Nations for some form of limited self-government under Clause 2 of Resolution 1514 (XV) of 1960 (the Declaration on the Granting of Independence to Colonial Countries and Peoples). Since the *Islands in the Sun Report* was released, the Shire of Christmas Island has been instrumental in agitating for greater self-determination. This has included asking the United Nations to consider the issue. One option is that the Christmas Island community could enter into a Free Association model similar to the arrangement currently operating in the Pacific Island nations of Niue and the Cook Islands with New Zealand. The Commonwealth has generally been opposed to self-determination options, a position that was reinforced in the 2015 JSCNET Inquiry Report, which was released in March

<sup>169</sup> Department of Infrastructure and Regional Development, *Norfolk Island Reform*. 2017. Available at [http://regional.gov.au/territories/norfolk\\_island/reforms/](http://regional.gov.au/territories/norfolk_island/reforms/)

<sup>170</sup> Commonwealth of Australia, *Islands in the Sun*, p. 193.

<sup>171</sup> JSCNET, Final Inquiry Report: Economic Development and Governance, p. 149.

2016. The Commonwealth stated that the Committee does not support a self- governance model operating in any external territory, including the IOTs.<sup>172</sup>

## **Conclusion**

Christmas Islanders have long harboured the hope of greater involvement in their governance. This is evident from submissions made by the community to JSCNET inquiries over a long period of time. The progressive devolution of democratic rights to Christmas Islanders by the Commonwealth is effected through mechanisms such as an applied delegated Western Australian legislative regime which does not allow Christmas Islanders to vote in Western Australian State elections, even though state legislation is applied. This approach continues to increase the Islanders' determination to seek alternative options. Integral to these continued aspirations is the social and cultural demography of Christmas Island community, particularly the Chinese and Malay inhabitants, who have been part of the historical development of the Island for more than 100 years. It is therefore essential to respond to the Island's different cultural elements if the goal of bringing the Island's community into a more mainstream way of Australian life is to be successful. As early as the mid-nineteenth century, the desire for representative and responsible government permeated the Australian community and gradually this was achieved by Federation in 1901. Australia is a democratic nation, in which governments are elected by popular vote. A healthy democracy requires that all members of the community have equal access to the political process that governs their lives. Yet in 2017, the community of Christmas Island does not enjoy this equal access and has still not achieved representative and responsible government.

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<sup>172</sup> JSCNCET, Final Inquiry Report: Economic Development and Governance, p. 145.

# The Western Australian Parliament's Relationship with the Executive: Recent Executive Actions and Their Impact on the Ability of Parliamentary Committees to Undertake Scrutiny<sup>173</sup>

Alex Hickman

Advisory Officer (Legal), Committee Office of the Western Australian Legislative Council

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## Introduction

This paper examines two examples to demonstrate the effect that Executive action can have on the ability of parliamentary committees to undertake their scrutiny function. The two examples are:

- The Executive amending regulations during a statutory review of the Western Australian Planning and Development (Development Assessment Panels) Regulations 2011 by the Standing Committee on Uniform Legislation and Statutes Review (Uniform Legislation Committee).
- A Minister's decision pursuant to the *Western Australian Financial Management Act 2006* that it was reasonable and appropriate not to provide to the Parliament certain information concerning the conduct or operation of an agency to the Standing Committee on Estimates and Financial Operations (Estimates Committee) on the ground of Cabinet confidentiality.

In the first example, I will provide a brief overview of statutory reviews of legislation as well as some commentary on the Executive's action during the Uniform Legislation Committee's review. In the second example, I will highlight the non-provision of information by the Executive to the Estimates Committee of the Western Australian Parliament and the response of the Auditor General of Western Australia. I will also draw attention to an interesting contrast between the powers to obtain this information of the Auditor General and the Information Commissioner. Arguably, these examples reinforce the imbalance of power between the Executive and the Parliament,<sup>174</sup> which can have an adverse impact on effective parliamentary scrutiny.

## The Rationale for Statutory Review of Legislation

Garth Thornton, a former Parliamentary Counsel of Western Australia and author of one of the leading texts on legislative drafting, has defined statutory review clauses as those that 'oblige the responsible Minister or some other identified authority or person to review the operation of legislation after a specified period and to report to Parliament with appropriate recommendations'.<sup>175</sup> One important consequence of a statutory review clause is that '[Parliament] does not attempt to speculate on the years ahead on the likely state of affairs'.<sup>176</sup> The review of the operation of legislation enables an assessment of how it has operated in practice, whether it is having the effect intended by its drafters (through processes such as

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<sup>173</sup> I would like to thank my colleagues at the Legislative Council Committee Office Anne Turner, Andrew Hawkes and Christine Kain for their reviews and commentary on a draft of this paper. I would also like to thank my colleagues in other jurisdictions who undertook research to identify examples of statutory reviews of legislation.

<sup>174</sup> In a paper presented at the 2016 Australian Study of Parliament Group National Conference, *Addressing the Balance: The Executive and the Parliament*, John Seal-Pollard explored the imbalance of power between the Executive and the Parliament, highlighting some worrying legislative trends. <https://www.parliament.sa.gov.au/ASPG/Documents/Paper%20Seal-Pollard.pdf>

<sup>175</sup> G. C. Thornton, *Legislative Drafting*. London: Butterworths, fourth edition, 1996, p. 216.

<sup>176</sup> Thornton, *Legislative Drafting*. See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 84, *Medicines, Poisons and Therapeutic Goods Bill 2013*, 18 February 2014, p. 51.

consultation with relevant stakeholders), and whether any **inadequacies can be overcome by** amendments.

As the Hon Kate Doust MLC stated when remarking on the lack of a review clause in the *Directors' Liability Reform Bill 2015*:

We enable parliamentary scrutiny to apply so that we can actually see whether or not it has worked. That is quite often why we like to have review provisions in, so that inquiries can be conducted, reports tabled and we can see whether it is actually doing what it was meant to do.<sup>177</sup>

In its 96<sup>th</sup> Report Co-operatives Amendment Bill 2015, the Uniform Legislation Committee stated 'review clauses are an important mechanism for Parliamentary accountability and oversight of legislation' and recommended the Bill be amended to provide for a review of the legislation after five years.<sup>178</sup> While the Government did not support the inclusion of such a clause on that occasion, the then responsible Minister, Hon Michael Mischin MLC, stated 'I accept entirely that there is a legitimate use for such provisions.'<sup>179</sup>

Statutory review clauses might require an initial review after a fixed period and then further reviews after fixed intervals.<sup>180</sup> The clause may also set out matters to consider as part of the review.<sup>181</sup> The review period varies in Western Australian legislation, for example, from specific time periods to the more general '*as soon as practicable*'.

### The Reviewer: Minister or Parliamentary Committee?

In most cases in Western Australia, a review of the operation of legislation is carried out by the responsible Minister or their delegate and a copy is tabled in the Parliament. However, on occasion, the legislation provides for a standing Legislative Council committee, chosen by the Legislative Council at the relevant time, to carry out a review.<sup>182</sup> While it is outside of the scope of this paper to undertake a detailed comparative analysis of whether it is more appropriate for statutory reviews to be undertaken by the responsible Minister or a parliamentary committee, I make the following, competing, observations:

- Parliamentary committees may have limited capacity to undertake statutory reviews given the sheer volume of statutory review clauses in Western Australian legislation as well as their often-heavy workload.

<sup>177</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 92, *Directors' Liability Reform Bill 2015*, 21 April 2015, pp. 15-16.

<sup>178</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 96, *Co-operatives Amendment Bill 2015*, 25 February 2016, pp. 17-18.

<sup>179</sup> Hon Michael Mischin MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 22 March 2016, p. 1495.

<sup>180</sup> See *Auditor General Act 2006 (WA)* s 48(1), which provides: 'The Joint Standing Committee on Audit is to carry out a review of the operation and effectiveness of this Act as soon as is practicable after the fifth anniversary of its commencement; and the expiry of each 5-yearly interval after that anniversary'. The *Economic Regulation Authority Act 2003 (WA)*, s 64, contains similar wording, referring to 'a Joint Standing Committee of both Houses of Parliament'.

<sup>181</sup> See *Auditor General Act 2006 (WA)* s 48(2), which provides: '(2) In the course of a review under subsection (1) the Joint Standing Committee on Audit is to consider and have regard to —whether there is a need for this Act to continue; and how the process for appointing an Auditor General has operated in practice; and whether the Auditor General's information gathering powers are adequate, particularly in relation to claims of legal professional privilege and Cabinet documents; and the impact of any exercise of the power to audit certain accounts of related entities; and the efficiency and effectiveness of the provisions for dealing with confidential information; and any other matters that appear to the Joint Standing Committee on Audit to be relevant to the operation and effectiveness of this Act'.

<sup>182</sup> See, for example, *State Administrative Tribunal Act 2004 (WA)* s 173. This was undertaken by the Standing Committee on Legislation. See Western Australia, Legislative Council, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, 20 May 2009; *Planning and Development Act 2005 (WA)* s 171F.

- The relevant government agency responsible for the oversight of the legislation will have a considerable amount of operational expertise to enable it to carry out reviews.<sup>183</sup>
- Parliamentary committees are well equipped to inquire into the operation of legislation, having a variety of evidence collection tools at their disposal as well as experience in legislative scrutiny.
- Parliamentary committees can bring an element of objectivity to a review of legislation that may be lacking in a ministerial review given the Minister's role in the oversight and operation of the legislation. This may become an important consideration if the legislation is particularly controversial.
- Committee reports can trigger further parliamentary scrutiny in a way that a Ministerial report may not by being automatically considered and debated after tabling in the Parliament.<sup>184</sup>

If a Parliament were minded to allocate more statutory reviews to its committees, one method of addressing any capacity issues might be to establish a dedicated committee or committees with this responsibility. This would depend on the extent of any capacity issues in the jurisdiction as well as the wording of the statutory review clause.

Examples in some other Australian jurisdictions of parliamentary committees undertaking reviews of legislation are set out in Table 1. It would appear, as is the case in Western Australia, statutory review clauses more often than not provide for the review to be undertaken by the responsible Minister, rather than a parliamentary committee.

**Table 1: Mechanisms for Statutory Review in Selected Australian Jurisdictions**

| Jurisdiction    | Minister or parliamentary committee?   | Examples of statutory review by a parliamentary committee   |
|-----------------|--|---|
| Commonwealth    | The responsible Minister is most commonly allocated the role of undertaking statutory reviews.   | Section 29 of the <i>Intelligence Services Act 2001</i> provides that the Parliamentary Joint Committee on Intelligence and Security is to review the operation, effectiveness and implications of various pieces of legislation, including Division 3 of Part III of the <i>Australian Security Intelligence Organisation Act 1979</i> .   |
| New South Wales | The responsible Minister is most commonly allocated the role of undertaking statutory reviews. Parliamentary committee reviews are rare. | Schedule 4, clause 12 of the <i>State Insurance and Care Governance Act 2015</i> , provides that a designated committee of the Legislative Council review the Act two years after its commencement.<br><br>Section 72C(5) of the <i>Independent Commission Against Corruption Act 1988</i> provides that a 'designated committee is to review a code of conduct adopted by the Legislative Council at least once every 4 years' (the Privileges Committee having been designated for this purpose). |
| Victoria        | It is rare for legislation to provide for a statutory review. When it does, the clauses generally stipulate either 'The                  | During debate in the Legislative Council on the Sex Offenders Registration Amendment Bill 2016, a Member moved an amendment providing for statutory review of the legislation by an independent body after two  |

<sup>183</sup> See Hon Helen Morton MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 22 September 2011, p. 7582.

<sup>184</sup> See Standing Orders 110 and 188 of the Legislative Council of Western Australia.

|            |   |  |
|------------|---|--|
|            | Minister is to review <sup>185</sup> or 'The Minister must cause an independent review of the operation of this Act'. <sup>186</sup>  | years of operation. The Minister for Training and Skills made the following statement in response: 'Statutory review provisions are ... generally limited to extraordinary pieces of legislation such as the Charter of Human Rights and Responsibilities Act 2006 and the Terrorism (Community Protection) Act 2003. We believe that it is sufficient that the Department of Justice and Regulation monitors the scheme informally and in consultation with relevant stakeholders ...'. <sup>187</sup><br><br>The Scrutiny of Acts and Regulations Committee undertook a review of the <i>Charter of Human Rights and Responsibilities Act 2006</i> pursuant to a Governor-in-Council Order in 2011. <sup>188</sup> |
| Queensland | Statutory reviews of legislation are typically performed by the relevant government department for the responsible Minister. There are numerous examples, such as s 132 of the <i>Food Production (Safety) Act 2000</i> ; s 121 of the <i>Biodiversity Act 2004</i> and s 90A of the <i>Farm Business Debt Mediation Act 2017</i> . | No contemporary examples were found of a parliamentary committee undertaking a statutory review of legislation. <sup>189</sup>   |

### Effects of Executive Action – Case Study 1: The Review of the Planning and Development (Development Assessment Panels) Regulations 2011

Development Assessment Panels (DAPs) are decision-making bodies comprised of three technical experts (appointed by the Minister for Planning) and two local government members, nominated by the relevant local government. They are responsible for determining certain planning approval applications in the place of the relevant responsible authority, most often the local government. DAPs were established in Western Australia on 1 July 2011 after the enactment of the *Approval and Related Reforms (No. 4) (Planning) Act 2010* in August 2010 (which introduced a new Part 11A into the *Planning and Development Act 2005*) and the publication of the Planning and Development (Development Assessment Panels) Regulations 2011 (Regulations) in the Government Gazette on 24 March 2011.

Section 171F of the *Planning and Development Act 2005*, which was introduced by an amendment moved by Hon Dr Sally Talbot MLC on 29 June 2010, provides:

171F. Review of regulations

- (1) An appropriate Standing Committee of the Legislative Council is to carry out a review of the operation and effectiveness of all regulations made

<sup>185</sup> *Professional Standards Act 2003* (Vic).

<sup>186</sup> *Gene Technology Act 2001* (Vic).

<sup>187</sup> Hon Steven Herbert MLC, Minister for Training and Skills, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 14 April 2016, pp. 1839.

<sup>188</sup> Victoria, Legislative Council, Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*.

[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf). Section 44(1) of the Act provides 'The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter', so it was a decision of the Executive to refer the inquiry to this committee.

<sup>189</sup> Queensland Parliamentary Library and Research Service, Research Brief, 31 August 2017.

under this Part as soon as practicable after the expiry of 2 years from the day on which regulations made under this Part first come into operation.

- (2) The Standing Committee is to prepare a report based on the review and, as soon as practicable after the report is prepared, is to cause the report to be laid before each House of Parliament.

During the Second Reading debate in the Legislative Council on the *Approvals and Related Reforms (No. 4) (Planning) Act 2010* (WA), Hon Dr Sally Talbot MLC gave the following justification for the insertion of section 171F:

I want to put to the minister my argument for having a statutory review that is carried out by an upper house standing committee rather than by the minister. To cite reasons, I need go no further than many of the reports that the government has received just in the relatively short time that I have been in the Parliament. We receive reports that have an enormous amount of detail in them. A report that is prepared by a standing committee is often a report that will rely on the evidence of witnesses. It is not always possible for a minister conducting a review to either have the breadth of input into who might be a stakeholder or, indeed, have the resources to consult those stakeholders in the way that a standing committee can. There is also the consideration that those hearings can be made public. A review by a standing committee of the Legislative Council would certainly be preferable to a ministerial review. Therefore, that is the amendment that I will move when we get to the appropriate place in the bill.<sup>190</sup>

The Government agreed with the Honourable Member's reasons.<sup>191</sup> Her remarks reinforce those made above regarding the various evidence collecting tools at a parliamentary committee's disposal, which can enable a very comprehensive analysis of the operation of legislation. The Legislative Council referred the Regulations 2011 to the Uniform Legislation Committee on 21 October 2014. An extension of time to report from 14 May 2015 to 8 September 2015 was granted on 17 March 2015. By this time, the Department of Planning (the Department) had undertaken its own review of the Regulations, which foreshadowed a number of changes to the DAP system.<sup>192</sup>

Regarding the implementation of the changes, the Department stated:

Implementation of the changes summarised above will be via modifications to the DAP Regulations and supporting documentation, including updates to communication and training material for all current and future DAP members.

Modifications to the DAP Regulations will be drafted immediately following release of this outcomes report, and the revised legislation will be

<sup>190</sup> Hon Dr Sally Talbot MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 24 June 2010, p. 4595. On another occasion, during the Second Reading debate for the *Approvals and Related Reforms (No. 1) (Planning) Act 2010* (WA) the Government did not agree to a similar amendment. See Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 9 September 2010, pp. 6241-6247.

<sup>191</sup> Hon Robyn McSweeney MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 June 2010, p. 4737.

<sup>192</sup> Department of Planning, *Planning makes it happen: phase two, Review of the Development Assessment Panels*, September 2013. [http://www.planning.wa.gov.au/dop\\_pub\\_pdf/DAPs\\_Review\\_final.pdf](http://www.planning.wa.gov.au/dop_pub_pdf/DAPs_Review_final.pdf) Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014. [http://www.planning.wa.gov.au/dop\\_pub\\_pdf/Review\\_of\\_DAPs.pdf](http://www.planning.wa.gov.au/dop_pub_pdf/Review_of_DAPs.pdf). See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 93, *Review of the Planning and Development (Development Assessment Panels) Regulations 2011*, 8 September 2015, pp. 21-23.

progressed through the statutory process as soon as possible once it is ready.<sup>193</sup>

On 21 April 2015, the Planning and Development (Development Assessment Panel) Amendment Regulations 2015 (Amendment Regulations) were tabled in the Legislative Council.<sup>194</sup> This was the first the Uniform Legislation Committee heard about the introduction of the Amendment Regulations. During a hearing with the Department, the Chair of the Committee stated:

Perhaps the tidiest way [to proceed] might have been for the government to have waited until after this inquiry was finished to see what it came up with before it rolled out the new regulations.<sup>195</sup>

Hon Brian Ellis MLC, a member of the Committee, expressed his concern as follows:

I am concerned that there is not much point looking at the old regulations. The new ones have only just come in, so we can ask at different hearings what people think about those new regulations, but they will not have been in long enough to get an idea whether they are positive or negative.<sup>196</sup>

The then Minister expressed regret the Committee was not advised in advance of the introduction of the Amendment Regulations.<sup>197</sup> However, he was of the view their introduction had not interfered with the Committee's inquiry:

I understand this information [the Department's review] was available to the Committee upon commencement of its review on 21 October 2014 and it was anticipated that this information would be included in or inform the scope of the Committee's review. I also understand that the Committee was briefed on the review when Department of Planning officers attended briefings with the Committee on 17 November 2014.

The ... Amendment Regulations are consistent with the review outcomes and contain nothing which hampers the Committee's ability to conduct the statutory review provided for by Section 171F of the Planning and Development Act 2005.<sup>198</sup>

Notwithstanding this response, it is clear from its report that the Committee was of the view that the Amendment Regulations should not have been introduced until the conclusion of its inquiry:

The Committee is of the view that the introduction of the Amendment Regulations by the Executive Government has hampered the work of the Committee and should have been postponed until the conclusion of the Committee's inquiry into the Regulations. It is important to note that:

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<sup>193</sup> Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014, p. 21. [http://www.planning.wa.gov.au/dop\\_pub\\_pdf/Review\\_of\\_DAPs.pdf](http://www.planning.wa.gov.au/dop_pub_pdf/Review_of_DAPs.pdf)

<sup>194</sup> The Explanatory Memorandum for the Amendment Regulations was signed by the Director General of the Department on 9 March 2015 and by the Minister for Planning on 11 March 2015.

<sup>195</sup> Hon Kate Doust MLC, Chair, Standing Committee on Uniform Legislation and Statutes Review, *Transcript of Evidence*, 4 May 2015, p. 4.

<sup>196</sup> Doust, *Transcript of Evidence*, p. 3.

<sup>197</sup> Hon John Day MLA, Minister for Planning, Letter, 18 May 2015.

<sup>198</sup> Day, Letter, 18 May 2015.

- The Committee was undertaking a Statutory Review required under section 171F of the Act, an Act which the Department administers. Amending regulations being considered during the course of the review interfered with the Committee's ability to properly undertake the review.
- The Executive Government was aware of the Committee's inquiry into the Regulations but failed to alert it of its intention to introduce the Amendment Regulations and obtain the Committee's views on how it may affect its inquiry.
- The Amendment Regulations amended and replaced a number of the regulations the Committee was considering during the course of its inquiry.
- It is not possible to conduct a meaningful inquiry into the operation and effectiveness of the Regulations amended by the Amendment Regulations as these would have only been in force for a few months prior to the tabling of this report (by 8 September 2015).
- Stakeholders providing submissions to the Committee did so in good faith on the basis that the Committee was inquiring into the Regulations as they were at the time.<sup>199</sup>

The Uniform Legislation Committee's position and reasoning is cogent. By failing to wait for the outcome of the inquiry, the Executive displayed, at best, a lack of courtesy and an indifference towards the work of the Uniform Legislation Committee, insofar as it may impact upon the Amendment Regulations and, at worst, disrespect towards the institution of Parliament. The following additional commentary by the Committee reinforces this view:

It is also relevant to note that, had the Committee not been required to seek an extension of time to report from the Legislative Council on 17 March 2015 and tabled its report on 14 May 2015, the introduction of the Amendment Regulations on 1 May 2015 would have rendered parts of its report obsolete. The Committee would have reviewed the operation and effectiveness of outdated regulations.<sup>200</sup>

It also leaves the Executive open to the criticism that it placed greater weight on a departmental review, which was an administrative process not compelled by statute, than on a statutory review by a parliamentary committee. The former is clearly subservient to the latter. This is despite the statutory review commencing at least a year later than required under section 171F of the Act. The Department was well aware of the commencement of the statutory review before the Amendment Regulations were tabled in Parliament.

The Uniform Legislation Committee also noted the then Minister subsequently agreed to delay the introduction of further amendments to the Regulations to address a notice of motion to disallow the Amendment Regulations tabled by the Joint Standing Committee on Delegated Legislation until after the conclusion of its inquiry. This contrasts glaringly with the timing of the tabling of the Amendment Regulations.<sup>201</sup> While this may have been a matter of administrative convenience, it could also be seen as a tacit admission of the appropriateness of waiting for the outcome of the statutory inquiry.

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<sup>199</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 93, *Review of the Planning and Development (Development Assessment Panels) Regulations 2011*, 8 September 2015, pp. 140-141. This view was shared by some witnesses who gave evidence to the Committee. See Standing Committee on Uniform Legislation and Statutes Review, Report 93, p. 140.

<sup>200</sup> Standing Committee on Uniform Legislation and Statutes Review, Report 93, p. 141. There was no mention by the Committee of the action potentially constituting a possible contempt of the Parliament. Any such allegation would have been reported to the Legislative Council, recommending it refer this question to the Procedure and Privileges Committee.

<sup>201</sup> Day, Letter, 18 May 2015.

This is not to say that there was any deliberate action on the part of the Executive to frustrate the work of the Uniform Legislation Committee or that the Executive breached the doctrine of the separation of powers by not having the power and, indeed, the right, to introduce legislation at a time of its choosing.<sup>202</sup> The absence of a recommendation by the Uniform Legislation Committee that the Executive delay the introduction of legislation until the conclusion of a statutory inquiry carried out by a committee of the Legislative Council could be seen as implicitly recognising this.<sup>203</sup> It is also clear the Executive's action did not derail the Committee's inquiry.

What it does say, in my opinion, is that the Executive needs to take care, when considering the timing of the introduction of legislation, to ensure the conduct of any relevant, parallel parliamentary process is respected. The Executive's actions in this instance pre-empted the outcome of a parliamentary inquiry and resulted in a missed opportunity to assess the Committee's findings regarding the operation of those regulations the Executive had already committed to amending.<sup>204</sup>

### **Suggestions for Reform**

While I am not aware of similar Executive action having occurred during an inquiry by a parliamentary committee in recent history in Western Australia, the fact remains there is nothing, currently, to prevent this issue from recurring. If the timing of introduction of the Amendment Regulations is considered to be an undesirable outcome, consideration should be given to addressing this.

One option might be the formulation of a directive, applying on a whole-of-government basis, requiring the Executive to wait until the outcome of a statutory review conducted by a parliamentary committee is known before proceeding with any relevant legislation. A Premier's Circular might be the appropriate source for such a directive, as it binds Ministers as well as public servants and relates to whole-of-government legislative and policy requirements.<sup>205</sup> This would enhance respect for the institution of Parliament and its committees.

It is acknowledged there is sometimes a need for urgent legislative action by government. Any directive could reflect this and contain relevant guidelines governing the circumstances in which this could occur, if necessary.

### **The Effects of Executive Action—Case Study 2: The Estimates Committee and Access to Strategic Asset Plans**

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<sup>202</sup> An interesting analogy is the well accepted principle that legislation which alters substantive rights, even if those rights are in issue in pending litigation, does not involve an interference with judicial power contrary to Chapter III of the *Commonwealth Constitution* and hence the separation of powers, unless it purports to direct the courts as to the manner and outcome of the exercise of their jurisdiction. See *Duncan v Independent Commission Against Corruption* [2015] HCA 32 [24-26] (French CJ, Kiefel, Bell and Keane JJ).

<sup>203</sup> See Standing Committee on Uniform Legislation and Statutes Review, Report 93, p. 141.

<sup>204</sup> It must also be remembered that it is the Parliament that has delegated to the Executive and other bodies the role of making subsidiary legislation and that the latter is accountable to the former as the law-making body in the Westminster system of government.

<sup>205</sup> <https://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Pages/Default.aspx>.

During 2016, the Estimates Committee sought access to Strategic Asset Plans<sup>206</sup> from various agencies to fulfil its role of scrutinising the financial operations of the Executive, including its long-term capital needs and the maintenance of existing capital works.<sup>207</sup>

Almost every agency gave the following generic response:

Strategic Asset Plans (SAPs) are prepared for Treasury as part of the Budget process to inform decision making by the Economic and Expenditure Reform Committee and Cabinet. Disclosure of these plans would reveal the deliberations and decisions of both bodies and are therefore considered Cabinet-in-Confidence. Until such time as specific programs within a SAP have been considered and approved to proceed they remain indicative. Additionally, and understandably 10-year SAPs are subject to a wide variety of exigencies including but not limited to priorities of the government of the day; changes in circumstances; changes in technologies and external events.<sup>208</sup>

Notices pursuant to section 82 of the *Financial Management Act 2006*<sup>209</sup> tabled in the Legislative Council stated disclosure of the Strategic Asset Plan would 'reveal Budget-related advice to both bodies which is Cabinet-in-confidence.'<sup>210</sup>

The Auditor General, as part of his role under section 24 of the *Auditor General Act 2006* to provide an opinion to Parliament whether the Minister's decision was reasonable and appropriate, made the following findings on refusals by various Ministers to provide copies of Strategic Asset Plans:

- The decision by certain Ministers not to provide Parliament with a copy of their department's Strategic Asset Plan was not reasonable and therefore not appropriate.
- The information contained in the Strategic Asset Plan was not prepared solely for consideration by Cabinet and some of the information it contains is publicly available.
- The Ministers did not consider whether a redacted version of the Strategic Asset Plan could be provided.
- The Department's advice to the Minister was brief and did not contain analysis or explore options to provide parts of the information to Parliament.
- It should not be assumed that all information associated with the Strategic Asset Plan is confidential.<sup>211</sup>

<sup>206</sup> See Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, 67<sup>th</sup> Report, *Budget Estimates Hearings 2016-17*, 15 September 2016, pp. 21-22, where the Committee stated that this document 'looks 10 years ahead to show how an agency intends to deliver practical services to the public using Government infrastructure, buildings, other assets, and related demand management initiatives'. See also Western Australian Auditor General's Report, *Opinions on Ministerial Notifications*, Report 18, August 2016 p. 6. <https://audit.wa.gov.au/reports-and-publications/reports/>

<sup>207</sup> This was sought as part of the 2014-15 Annual Report and 2016-17 Budget Estimates hearings processes. See Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, 67<sup>th</sup> Report, *Budget Estimates Hearings 2016-17*, 15 September 2016, pp. 24-25.

<sup>208</sup> Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, 67<sup>th</sup> Report, *Budget Estimates Hearings 2016-17*, 15 September 2016, p. 22.

<sup>209</sup> Section 82, which is unique in Australia, contains a procedure which requires 'a Minister to notify the Parliament and the Auditor General of a decision not to provide certain information to the Parliament and provide reasons for why that information was withheld'. These notices are often known as 'section 82 notices'. The Auditor General is required to form an opinion on whether the Minister's decision to withhold information from the Parliament is 'reasonable and appropriate' and to report that opinion to the Parliament. These reports are titled 'Opinions on Ministerial Notifications'.

<sup>210</sup> Standing Committee on Estimates and Financial Operations, 67<sup>th</sup> Report, *Budget Estimates Hearings 2016-17*, n37, p. 23.

<sup>211</sup> Western Australian Auditor General's Report, *Opinions on Ministerial Notifications*, Report 18, August 2016. <https://audit.wa.gov.au/reports-and-publications/reports/>

The departments of Treasury and Premier and Cabinet committed to providing guidance to agencies regarding the issue of the Cabinet-in-confidence status of Strategic Asset Plans following the recommendation made by the Auditor General to this effect.<sup>212</sup>

There is no doubt the Estimates Committee could make a significant contribution to the scrutiny of Western Australia's financial administration by having access to Strategic Asset Plans, enabling it to assess the adequacy of ten year forward financial planning by individual agencies and question them accordingly. On the other hand, the State's budget cycle includes forward estimates extending four, rather than ten, financial years, with planning for expenditure for the remaining six years part of the Cabinet decision making process and not usually subject to public dissemination.

This is not to say that all information sought by the Estimates Committee contained in Strategic Asset Plans was limited to information such as long-term capital needs outside of the budget cycle. For instance, the Committee asked for the dollar value of maintenance backlog for police facilities by year and was informed by the then Minister for Police that '[the requested] information is a component of the WA Police Strategic Asset Plan, which is Cabinet in Confidence and, therefore not able to be released'.<sup>213</sup>

Of course, there is nothing to prevent the Executive from making Strategic Asset Plans public, at least in a redacted version, or for the Estimates Committee to receive them in private (although the scrutiny of budget estimates has always been a mostly public process).<sup>214</sup> Successive governments do not appear to have availed themselves of these options.

### Access Through Freedom of Information Applications

Despite the difficulties faced by the Estimates Committee in obtaining the information contained in Strategic Asset Plans, there is another avenue by which it can be sought. As in many other jurisdictions, in Western Australia a person can request access to documents held by the State and local governments under the *Freedom of Information Act 1992* (FOI Act).

Whereas the Auditor General has the power to give an opinion on the Minister's decision not to release information, the Information Commissioner, after forming an opinion, can also order the release of information subject to an application under the FOI Act. Such an application could be, and has been, made by Members of Parliament, which can include members of parliamentary committees.

Regarding any application for the release of a Strategic Asset Plan, clause 1(1)(b) of Schedule 1 of the FOI Act provides that information is exempt if its disclosure would reveal the deliberations or decisions of an Executive body. This includes information that contains policy options or recommendations prepared for possible submission to an Executive body (which is defined in subclause 6 as Cabinet; a committee of Cabinet; a subcommittee of Cabinet or the Executive Council).<sup>215</sup>

<sup>212</sup> Auditor General's Report, *Opinions on Ministerial Notifications*.

<sup>213</sup> Hon Liza Harvey MLA, Minister for Police, Answer to question on notice asked at hearing held 7 December 2015, dated 13 January 2016, p. 13.

<sup>214</sup> As the Committee has the power to make documents it receives public, despite previously having a private status, one reason may be the Executive not wanting to risk the release of the information.

<sup>215</sup> For an example of where the Information Commissioner found information to be exempt under clause 1(1)(b) of the FOI Act, see *Re Ravlich and Department of the Premier and Cabinet* [2011] WAICmr 3, where the Information Commissioner found two of the documents sought by the applicant related to a policy option or recommendation prepared for possible submission to the Economic and Expenditure Review Committee, which is a Cabinet body. See also the discussion on Cabinet Confidentiality and Freedom of Information in Beverly Duffy, 'Orders for Papers and Cabinet Confidentiality Post *Egan v Chadwick*', *Australasian Parliamentary Review*, 21(2), 2006, pp. 99-102. Sven Bluemmel, *Freedom of Information: Lessons and Challenges in Western Australia*. A paper presented at the 2010 Australian Institute of Administrative Law Forum, Sydney, 23 July 2010, p. 38, states that '[i]nformation is ... not protected from disclosure merely because it was submitted to an Executive body, unless it was originally brought into existence for the purpose of such a submission'.

While I am not aware of any decision by the Information Commissioner on an application for access to a Strategic Asset Plan of a government agency or similar document, it is interesting to highlight this alternative method. Any order to release a Strategic Asset Plan to an applicant would enable them, presumably, to use the information for whatever purpose they saw fit.

It is important to emphasise that both the Auditor General and Information Commissioner have separate decision-making processes to follow regarding the release of information subject to a claim of Cabinet confidentiality. Accordingly, the Auditor General may be of the opinion a Minister's decision not to release a Strategic Asset Plan was reasonable and appropriate, while the Information Commissioner may decide it does not fall within the exemption contained in clause 1(1)(b) of the FOI Act and order its release.

## Conclusion

The two examples discussed in this article of Executive action having an impact on the scrutiny function of committees of the Western Australian Legislative Council serve as an important reminder of how an imbalance can develop in the relationship between the Executive and the Parliament.

In the first example, the power of the Executive to introduce legislation at a time of its choosing, which resulted in the effective pre-emption of the outcome of a parliamentary inquiry, demonstrates the need for the Executive to ensure parallel parliamentary processes are respected. In the second example, claims of Cabinet confidentiality by the Executive over certain documents prevented a parliamentary committee from assessing information regarding the financial administration of the State, despite such claims being open to challenge through freedom of information processes that may result in an order for public release of the documents.

While existing accountability mechanisms, such as section 82 of the Western Australian *Financial Management Act 2006* and the ability of parliamentary committees to draw Executive action to the attention of Parliament, are useful in seeking to address this imbalance, challenges and opportunities remain for reform to further strengthen Executive accountability to the Parliament and the people of Western Australia.

One possible reform suggested here—a whole-of-government directive requiring the Executive to wait until the outcome of any statutory review conducted by a parliamentary committee is known before proceeding with any relevant legislation—is worthy of consideration. It would represent a clear recognition by the Executive of the importance of respecting parliamentary processes.

Finally, I would welcome readers sharing any information they have on the following issues in their own jurisdictions:

- Examples of statutory reviews of legislation (both primary and subsidiary) undertaken by parliamentary committees, as well as any commentary on committee versus ministerial review.
- Whether there has been any Executive action during a parliamentary committee inquiry similar to that described in this article.
- Whether the Executive has granted access to Strategic Asset Plans or similar documents.
- Whether the Information Commissioner or equivalent office holder has ordered access to Strategic Asset Plans or similar documents. If so, under what, if any, conditions.

## Developing an Ethical Culture in Public Sector Governance: The Role of Integrity Agencies

Chris Aulich\* and Roger Wettenhall\*\*

\*Visiting Professor, Institute for Governance and Policy Analysis, University of Canberra and Adjunct Professor, University of New South Wales, Canberra

\*\*Emeritus Professor, Institute for Governance and Policy Analysis, University of Canberra

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### Abstract

Integrity in government can be conceived as a system of laws, regulations, conventions, codes of conduct and established agencies which, taken together as a system, aim to address corruption, misconduct and maladministration. This article discusses the notion of a system of integrity and then focuses on integrity agencies as one contribution towards developing an ethical culture in public administration. Integrity agencies, for various reasons, require independence from the government in order to effectively fulfill their roles. The article raises a number of incidents where executive overreach, in particular, has challenged this independence and suggests a number of ways where independence can be protected and even fostered. The article focuses primarily on the Commonwealth government and is particularly relevant at a time when the Commonwealth Parliament is examining proposals to establish an anti-corruption body.

### Introduction

Integrity in public administration typically relates to means of tackling corruption, misconduct and maladministration with a view to establishing a culture of ethical behaviour among all participants in the political-administrative system. What has become clear to many commentators is that a systems view is increasingly being seen as the most effective way of fostering this ethical culture. An integrity system is a series of institutions and practices that collectively aim to build integrity, transparency and accountability in the public sector. This typically involves a mix of institutions, laws, regulations, codes, policies and procedures, which together provide a framework of checks and balances. This framework works to foster an environment of high-quality decision-making and identify and address inappropriate behaviour including corruption.<sup>216</sup>

The use of the word 'integrity' in this context has meaning beyond ethical behaviour to include the notion of being whole or undiminished—a system intact. An effective integrity system requires a range of interlinked arrangements, processes and laws that in total help to generate an effective culture of integrity. A system is more than separately establishing special-purpose integrity agencies, calling commissions of inquiry when specific situations arise, adopting codes of conduct or establishing mechanisms for investigating breaches of ethical behaviour. It is the sum of these elements, or as Transparency International (TI) has recommended, it is a set or system of institutional pillars (see below).<sup>217</sup>

This article has been developed within this TI framework. It argues that specific-purpose integrity agencies are a necessary contribution to the establishment of an effective integrity system, but only as one part of a broader, integrated institutional approach to developing and sustaining good governance. The argument is developed in two main parts. The first

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<sup>216</sup> E. Proust, *Review of Victoria's Integrity and Anti-Corruption System*. Melbourne: State Services Authority, 2010.

<sup>217</sup> Jeremy Pope (ed.), *Confronting Corruption: The Elements of a National Integrity System*. Berlin: Transparency International, second edition, 2000.

focuses on some of the issues relating to the establishment and assessment of an integrity system. The second deals with the establishment, development and enculturation of specialised integrity agencies as one of the critical pillars of a total integrity system. We regard integrity agencies as state institutions with specific responsibility for monitoring, reviewing and fostering integrity as an integral element of good governance and countering any abuses detected. The article raises two crucial elements that are endemic to the establishment and development of such agencies: firstly, the changing roles of these agencies with their constant search for legitimacy over time; and secondly, the continuing need to balance agency autonomy and government control over their activities.

### Developing an Effective Integrity System

Antipodean experience was significant in developing the notion of a 'national integrity system' built on a network of interrelated 'pillars' that sustain and promote integrity and enable anti-corruption reforms to be addressed.<sup>218</sup> TI had been established in the early 1990s as a small international organisation designed to confront what was seen as the 'curse of corruption', and, over the next few years, the foundation managing director, New Zealand Human Rights Commissioner Jeremy Pope, produced what became the much-publicised TI source book: *Confronting Corruption: The Elements of a National Security System*.<sup>219</sup> By 2008, this book had been translated into over 25 languages, and the experience of the Australian State of Queensland had been particularly influential in its preparation. In that state in the 1980s, the Fitzgerald Royal Commission had investigated a variety of corrupt practices, and its widely studied report argued that piecemeal solutions to the problems of corruption were self-defeating because they concealed so much.<sup>220</sup> The Commission Report, and the TI system which followed, urged the institutionalisation of integrity through a number of agencies, laws, practices and ethical codes. The model system was based on the metaphor of an ancient Greek temple where the various structural components were mutually reinforcing, with integrity agencies as an essential component (see Figure 1).<sup>221</sup>

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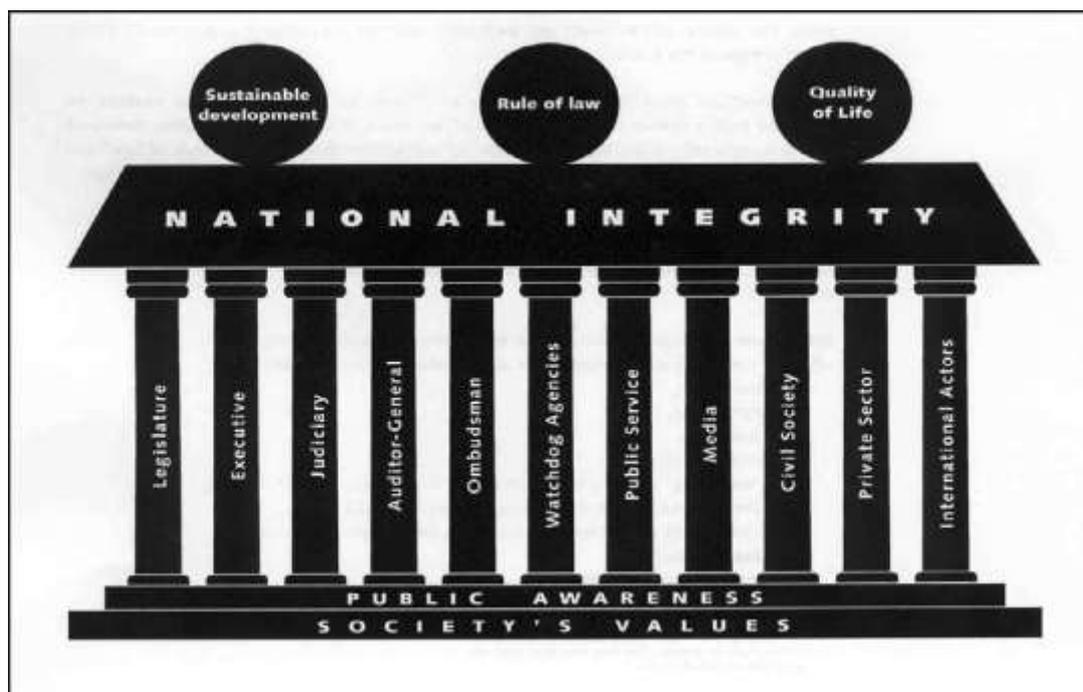
<sup>218</sup> Brian Head, 'The Contributions of Integrity Agencies to Good Governance'. *Policy Studies*, 33(1), 2012, pp. 7–20.

<sup>219</sup> Pope, *Confronting Corruption*.

<sup>220</sup> G.E. Fitzgerald, *Report of a Commission of Inquiry into Possible Illegal activities and Associated Misconduct*. Brisbane: Queensland Government, 1989.

<sup>221</sup> Pope, *Confronting Corruption*; Jeremy Pope, 'National Integrity Systems: The Key to Building Sustainable, Just and Honest Government', in Brian Head, A.J. Brown and Carmel Connors (eds.), *Promoting Integrity: Evaluating and Improving Public Institutions*. Aldershot: Ashgate, 2008.

**Figure 1: Transparency International's 'Institutional Pillars of a Model National Integrity System'<sup>222</sup>**



As the TI 'pillars of integrity' model makes clear, in a well-developed integrity system the factors that underpin good governance and promote the ethical and effective pursuit of public purposes would be diffused throughout the social, economic, cultural, legal and political institutions of a nation. According to Brian Head, however, in most jurisdictions it is common for these principles and practices to be unevenly distributed. This may relate to local circumstances and the variation in critical issues to be addressed; it may relate to issues of funding, as integrity functions are often inadequately and inconsistently funded; and it also may relate to patchy monitoring and oversight arrangements. Head suggests a special importance for political and institutional leadership in clarifying and enforcing standards and providing clear guidance as to how public officials and bodies should discharge their responsibilities and accountabilities in particular jurisdictions.<sup>223</sup>

Numerous locally-driven approaches have been developed worldwide. One widely-used strategy has been to establish codes of conduct that set out the requirements for probity in decision-making for various actors in government such as politicians, their advisers and public servants. Other measures involve the establishment of specific processes for the probity of key financial procedures (such as procurement, financial controls, budget 'honesty' and audit). An increasingly debated approach for integrity reform has been to establish specialist integrity bodies to independently define, promote and enforce standards and to investigate potential offenders for breaches of integrity regulations. However, the extent of these local variations has been such that broad questions of international comparability and best practice have been difficult to determine.

Nevertheless, some attempts have been made by international organisations to assess and rank countries in terms of their performance in establishing and maintaining integrity, for example, the World Bank, the United Nations and the OECD, as well as several international advocacy bodies and various major NGO bodies involved in delivering foreign aid. In

<sup>222</sup> Pope, *Confronting Corruption*.

<sup>223</sup> Head, 'Contributions of Integrity Agencies'.

relation to foreign aid, the leverage connected with large aid recipients and emerging markets has been utilised by many international bodies to ‘encourage’ stronger efforts in establishing and developing more robust integrity systems in recipient countries. Global integrity surveys have noted a policy trend for wealthy donor countries to insist on greater action to curb corruption in exchange for increased investment and foreign aid.<sup>224</sup>

The first global integrity study examined corruption, accountability and openness in 25 countries and compiled a list of indicators across six main governance categories.<sup>225</sup> This index was used to ‘score’ the national frameworks and safeguards designed to promote public integrity and accountability and prevent corruption or abuses of power. The index assessed three dimensions of these governance categories: first, the existence of mechanisms, including laws and institutions, which promote public accountability and limit corruption; second, the effectiveness of these mechanisms; and third, the access that citizens have to public information to hold their government accountable.<sup>226</sup> The studies found that all countries were susceptible to abuses of power, whether from a lack of transparency, a lack of accountability from an independent agency overseeing the electoral process, or having no disclosure requirements or limits on money from individuals and corporations flowing into the political system.<sup>227</sup> Secretive political party finances were shown to be a major contributor to corrupt practice in ten of the 25 countries surveyed, the implication being that strong and independent electoral commissions should be included in the list of watchdog integrity agencies.<sup>228</sup>

In underlining the importance of a systems approach, studies such as those noted above lead to conclusions that accountability of governments requires not just an effective and just electoral process, but also independent media, strong civil society organisations, institutional checks and balances and internal anti-corruption mechanisms. Poor regulation of political financing has often been seen as the most significant issue for integrity and accountability, with the risk that the ‘nexus’ between money and power would be normalised in many countries. Attention has been drawn to the lack of will and capacity of some legislatures to establish robust regulatory and accountability regimes, including those for freedom of information and protection of whistleblowers.<sup>229</sup>

Other international bodies and international agreements have contributed importantly to an understanding of these issues and sought to improve the foundations for good governance and reduced corruption within and across countries. There are also more general surveys and assessments of democratic robustness through avenues such as The Economist Intelligence Unit’s index of democracy.<sup>230</sup> The World Bank Institute also has been particularly active in promoting numerous enhancements to integrity systems, such as:

- disclosure of assets and incomes by officials and political candidates;
- disclosure of political campaign contributions;

<sup>224</sup> Global Integrity, *Global Integrity Report*, 2006. <http://www.globalintegrity.org>; Global Integrity, *Global Integrity Report*, 2009. <http://www.globalintegrity.org>.

<sup>225</sup> M. Camerer, *Global Integrity: An Investigative Report Tracking Corruption, Accountability and Openness in 25 Countries*. Washington: Centre for Public Integrity, 2004.

<sup>226</sup> Head, ‘Contributions of Integrity Agencies’.

<sup>227</sup> Camerer, *Global Integrity*.

<sup>228</sup> Camerer, *Global Integrity*; M.E. Warren, ‘What Does Corruption Mean in a Democracy?’, *American Journal of Political Science*, 48(2), 2004, pp. 328–343.

<sup>229</sup> Head, ‘Contributions of Integrity Agencies’.

<sup>230</sup> The Economist Intelligence Unit, *Democracy Index 2014*.

[https://www.eiu.com/public/topical\\_report.aspx?campaignid=Democracy0115](https://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115)

- publication of draft legislation and details of legislative voting;
- strong regulation to prevent conflict of interest;
- black-banning further contracts with firms involved in bribery;
- freedom of media and freedom of official information legislation;
- high standards for public financial reporting;
- transparent procurement systems; and,
- support for integrity surveys.<sup>231</sup>

International agreements that encourage signatories to adopt certain integrity principles in their jurisdictions include the Paris Principles adopted by the UN General Assembly in 1993, aimed particularly at the governance of human rights institutions,<sup>232</sup> and the Latimer House Principles agreed to by Commonwealth countries in 2002 to assist in providing an effective framework for the implementation by their governments, parliaments and judiciaries of good governance, the rule of law and human rights. These principles include a number of approaches for developing good governance, such as the establishment of specific purpose entities with clear guidelines for appointment of office-holders based on merit and proven integrity, and with specific arrangements to guarantee appropriate security of tenure and protection of levels of remuneration. The Latimer House Principles also suggest that adequate resources should be provided to enable agencies to operate effectively without any undue constraints that may hamper the independence sought.<sup>233</sup> This raises the important issue of independent funding for integrity agencies, as situations have arisen in some jurisdictions whereby governments of the day have reduced operational budgets with the intention of constraining integrity agencies, particularly in relation to their exercise of investigative powers.<sup>234</sup>

There is no single recipe for institutional improvement, and for every country attention needs to be paid to the complementarities among the various tools and indicators, aggregate and disaggregate, subjective and objective.<sup>235</sup> It should be noted that existing cultural and behavioural patterns significantly constrain future pathways, and successful institutionalisation of new patterns always takes a considerable time to achieve.<sup>236</sup> The experiences summarised above demonstrate that the existence of legal and quasi-legal arrangements creating specific integrity bodies may be a necessary but not sufficient condition to ensure integrity in public sector conduct. A key question is whether these institutional arrangements have the necessary capacities and resources of powers, finances and expertise to achieve their desired outcomes.

Promoting integrity is partly about minimising fraud and misconduct, but ultimately it is about the quality of democratic accountability.<sup>237</sup> Warren has suggested that in a democracy the real damage inflicted by corruption is in its undermining of public trust in the norms of

<sup>231</sup> World Bank Institute, *Global Competitiveness Report, 2005–2006*. Washington: The World Bank Institute, 2005.

<sup>232</sup> United Nations High Commissioner for Human Rights, Principles Relating to the Status of National Institutions (Paris Principles), 1993. <http://www2.ohchr.org/english/law/parisprinciples.htm>

<sup>233</sup> Commonwealth Secretariat, Commonwealth (Latimer House) Principles on the Three Branches of Government. London: Commonwealth Secretariat, the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges Association and the Commonwealth Lawyers' Association, 2004.

<sup>234</sup> Chris Aulich, 'Autonomy and Control in Three Australian Capital Territory-Based Integrity Agencies', *Policy Studies*, 33(1), 2012, pp. 49–63; T. Smith, D. Harper and S. Charles, 'Abbott Government Shirts Parliament and Muzzles the FOI Watchdog', *The Canberra Times*, 26 May 2015.

<sup>235</sup> D. Kaufmann and A. Kraay, *On Measuring Governance: Framing Issues for Debate*. Issues paper for roundtable on measuring governance. Washington, DC: World Bank Institute, 2007.

<sup>236</sup> Brian Head, A.J. Brown and Carmel Connors (eds.), *Promoting Integrity: Evaluating and Improving Public Institutions*. Aldershot: Ashgate, 2008; Peter Larmour, *Foreign Flowers: Institutional Transfer and Good Governance in the Pacific Islands*. Honolulu: University of Hawaii Press, 2005.

<sup>237</sup> Head, 'Contributions of Integrity Agencies'.

inclusive democratic decision-making, which underpin the public sphere itself.<sup>238</sup> It is this that suggests a role for specialised integrity agencies that are accessible to the public and have included investigative capability to respond to public concerns.

## Integrity Agencies

This section considers how specialised integrity agencies fit into the broader spectrum of integrity assessment and integrity promotion within the public sector. The word ‘agency’ is used widely and often indiscriminately in machinery-of-government discussions,<sup>239</sup> as the creation of agencies can vary hugely between jurisdictions. We identify four overlapping types of agency that make their respective contributions to a system of integrity.

The first agencies are those bodies with checking and vetting responsibilities over other parts of the administrative system, such as the offices of auditor-general, ombudsman, privacy commission and human rights commission. These are typically referred to as ‘watchdog’ bodies because they are often required to check on government operations and therefore need to operate at arm’s length from it. Second, are those agencies that must be at arm’s length from the government to enable them to undertake their regular administrative responsibilities, such as electoral commissions or information and data protection bodies. Third, are the anti-corruption bodies that are established specifically to investigate matters of corruption in the public sector and its stakeholder organisations. These, too, are watchdog agencies, nowadays typically established with an additional preventive role in providing advice and education in anti-corruption matters to public sector bodies and stakeholder organisations. Fourth, in some jurisdictions, a group of integrity agencies might be gathered directly under the auspices of the parliament and, according to some commentators, warrant recognition as a ‘fourth branch’ of government alongside the legislature, executive and judiciary. As ‘officers of parliament’ they are accountable directly to the parliament and its committees rather than to a minister or member of the executive branch.

The independent role of integrity agencies in managing corruption investigations, conducting audits and enhancing public sector ethics has increasingly been promoted as essential for good governance. However, typically they do not provide a monopoly in oversight as their work is often complemented by other oversight functions within the established branches of government, such as parliamentary committees or judicial oversight of all unlawful actions and administrative law disputation.

Specialised integrity agencies with a degree of independence from the executive have developed at various stages in the institutional evolution of particular countries. Thus, independent audit offices have had a lengthy history in the oversight of public finances and checking financial probity, their development representing an important milestone in the construction of the Westminster system of parliamentary government.<sup>240</sup> Similarly, ombudsman-style bodies for the investigation of citizens’ complaints against administrative action flow from important Swedish machinery-of-government innovations, and have a long history in some countries: such independent offices became more common through the 1970s and 1980s and are now very widespread.<sup>241</sup> Also, in some jurisdictions, independent police integrity agencies have been established specifically to handle integrity issues

<sup>238</sup> Warren, ‘What Does Corruption Mean?’.

<sup>239</sup> Roger Wettenhall, ‘Agencies and Non-Departmental Public Bodies: The Hard and Soft Lenses of Agencification Theory’. *Public Management Review*, 7(4), 2005, pp. 615–635.

<sup>240</sup> Ken Coghill, *Auditing the Independence of the Auditor-General*. Democratic Audit Occasional Paper. Canberra: Australian National University, Canberra, 2004. <http://democratic.audit.anu.edu.au>; Head, ‘Contributions of Integrity Agencies’.

<sup>241</sup> G. Caiden (ed.), *International Handbook of the Ombudsman*. Westport: Greenwood Press, 1983; D.C. Rowat, *The Ombudsman Plan*. Lanham: University Press of America, second edition, 1985.

involving police.<sup>242</sup> Anti-corruption commissions, with strong and wide-ranging powers to investigate and prosecute all classes of public officials, have largely emerged in the last two decades but they are still few in number.<sup>243</sup>

The argument for supporting and strengthening these specialised integrity agencies is linked to the argument that good governance requires sustained investment in institutional monitoring and reform, and corresponding political and financial commitments to such processes.<sup>244</sup> The link between integrity agencies and the broad system of integrity is significant: if the basic systems for financial and political accountability are seriously deficient, specialised integrity bodies are also likely to be less effective,<sup>245</sup> so we can conclude that specialised integrity agencies may be problematic for those countries that have weak results on general corruption scorecards. There are serious challenges, even in countries that rate well in these scorecards, with relationships between legislatures and executive governments figuring prominently in solutions attempted or compromises arrived at.

While governments can sometimes appear to have institutions and processes in place to pursue integrity and control corruption, the actual capacity of those institutions to do so may be very limited. This implementation gap may derive from a number of sources: cultural values, ethnic loyalties, legal inadequacies, administrative confusions, poor skills training or a lack of clear political mandate for change. Thus, in practice, countries with higher integrity levels tend to be better able to use dedicated agencies to maintain or improve their levels of integrity. In such countries, civic concern about perceived ongoing incidents of corrupt behaviour can become a force to drive and inspire further levels of reform.<sup>246</sup>

### **Autonomy and Control in Integrity Agencies**

How much autonomy integrity agencies should have and how much control over them should be exercised by central government are major questions. They are of course questions that emerge with all arm's-length bodies, and they have generated much discussion in the theory and practice of public administration. While we are here concerned primarily with integrity agencies, it needs to be observed in relation to the whole population of such bodies that the balance between autonomy and control has waxed and waned as governments have changed their preferences over time. This is a critical decision for governments as they seek a stable balance between the need for central political control and accountability and pressures for agency autonomy and professional independence.<sup>247</sup> Evidence from many countries shows that relationships between government and agency are often in motion with centralising and decentralising pressures jockeying for supremacy; thus, a survey of Australian agencies in 2007–08 revealed a steady shift towards devolution over the previous decade or so, but a shift which had more recently been tempered by the exercise of stronger central control over agencies.<sup>248</sup>

<sup>242</sup> Colleen Lewis and Tim Prenzler, 'Australian Police Oversight Agencies: Measuring Effectiveness', in Brian Head, A.J. Brown and Carmel Connors (eds.), *Promoting Integrity: Evaluating and Improving Public Institutions*. Aldershot: Ashgate, 2008.

<sup>243</sup> Head, 'Contributions of Integrity Agencies'; A.J. Brown, A Federal Anti-Corruption Agency for Australia. Discussion Paper. Griffith University and Transparency International, 2017. <https://www.accountabilityrt.org/wp-content/uploads/2017/03/Griffith-University-National-Integrity-2017-Discussion-Paper-A-Federal-Anti-Corruption-Agency-for-Australia-March-2017.pdf>

<sup>244</sup> Head, 'Contributions of Integrity Agencies'.

<sup>245</sup> J.R. Heilbrunn, 'Anti-Corruption Commissions', in R. Stapleton, N. Johnston and R. Pellizo (eds.). *The Role of Parliament in Curbing Corruption*. Washington: The World Bank, 2006.

<sup>246</sup> Head, 'Contributions of Integrity Agencies'; Samuel Ankamah and S.M. Manzoor E. Khoda, 'Political Will and Government Anti-Corruption Efforts: What Does the Evidence Say?', *Public Administration and Development*, 38(1), 2018, pp. 1-14.

<sup>247</sup> P. Læg Reid, P. Roness and K. Rubecksen, 'Autonomy and Control in the Norwegian Civil Service: Does Agency Form Matter?', in T. Christensen and P. Laegreid (eds.), *Autonomy and Regulation*. Cheltenham: Edward Elgar, 2006.

<sup>248</sup> Roger Wettenhall and Chris Aulich, 'The Public Sector's Use of Agencies: A Dynamic Rather Than Static Scene', *Public Organization Review*, 9(2), 2009, pp. 101–118; C. Aulich, H. Batainah and R. Wettenhall, 'Autonomy and Control in Australian

Turning particularly to integrity agencies, it is important to establish conditions which ensure that, when an appropriate measure of autonomy has been realised, there are protections to ensure that this autonomy is not easily eroded. The search for legitimacy involves measures to ensure that an organisation becomes enculturated in its society and normalised as ‘the way we do things around here’.<sup>249</sup> For integrity agencies, this means becoming firmly embedded in both the encompassing system of governance and the national integrity system associated with it. It can often appear that the necessary conditions have been achieved, but such appearance can be very deceptive leading to too frequent recognition of the disease of tokenism.

A text for this discussion was provided by a 2006 study sponsored by the World Bank Institute, focusing on the role of parliaments in curbing corruption. It recognised that anti-corruption commissions were desperately needed;<sup>250</sup> however, it lamented that,

Evidence of dysfunctional anti-corruption commissions is manifest in the numerous agencies that lack independence from the executive, receive inadequate budgetary support from the legislature, have no procedures for forwarding cases of corruption for prosecution by the relevant judicial authorities, and fail to submit regular reports to the legislature. Herein lies the dilemma: whereas it may be desirable to enact policies to reduce corruption, a weak commission leads to a reputation for token reforms, which undermines the political leadership’s credibility. Indeed, it is easy to explain why anti-corruption commissions fail in so many places. It is far more difficult to explain why any succeed.<sup>251</sup>

A common-enough condition with ombudsman offices was reflected by Professor Dennis Pearce soon after he had retired from the office of Australian Commonwealth Ombudsman:

To have an Ombudsman makes a government feel good. To underfund the office ensures that it is not too troublesome. After three years as Commonwealth Ombudsman I realised that no matter how strong a case for increased resources was put by the Ombudsman’s Office, nothing would be coming from those who manage the Commonwealth’s money. Why should the Executive fund a body that is going to call it to account as a result of complaints from members of the public affected by the Executive’s decisions? Governments like to point to the fact that an independent person is available to review their decisions, but they do not wish the review body to be too powerful or too well-known, lest citizens be inclined to take frequent advantage of the office.<sup>252</sup>

None of this is surprising. As the first Commissioner of the Independent Commission Against Corruption in New South Wales (NSW), Ian Temby, pointed out, what we are now describing as integrity agencies were,

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Agencies: Data and Preliminary Findings from a Cross-National Empirical Study’, *Australian Journal of Public Administration*, 69(2), 2010, pp. 214–228.

<sup>249</sup> C.M. Bower, C.M., *The Will to Manage*. New York: McGraw Hill, 1966; E. Schein, *Organizational Culture and Leadership: A Dynamic View*. San Francisco: Jossey-Bass, 1992.

<sup>250</sup> F.A. Leautier, ‘Foreword’, in R. Stapleton, N. Johnston and R. Pellizo (eds.), *The Role of Parliament in Curbing Corruption*. Washington: The World Bank, 2006.

<sup>251</sup> Heilbrunn, ‘Anti-Corruption Commissions’, p. 135.

<sup>252</sup> D. Pearce, ‘Minding the People’s Minder’, *AIAL Forum*, 1, 1994, p. 42.

bound to cause displeasure from time to time... There will...be awkwardness because an important function of government, whatever it may be, is disclosed as being inadequately performed. It is the need for that demonstration to occur which imposes the requirement for independence. Only a non-partisan body can be authoritative and will enjoy public confidence. Periods of disharmony between government and independent offices are, accordingly, inevitable. If they were never encountered, the only available conclusion would be that the independent officer was not doing his or her job properly...

The fact of that disharmony, the inevitability of it occurring from time to time, of course brings one to Parliament. It is Parliament that creates all of these bodies and it is Parliament that must look after them. When relations between a particular government and an independent officer, say an Ombudsman, become strained, the protection and support must be vouchsafed by Parliament. Why is this so? First, because parenthood brings responsibilities. Secondly, because those not directly affected can appreciate that the proper performance of functions, simply doing the job laid down by legislation, can involve the making of inconvenient decisions. Thirdly, because the Parliament directly distils and reflects the will of the people in a way that government and the bureaucracy never can and never will.<sup>253</sup>

## Recent Australian Experience

Pearce's and Temby's cautionary notes above have proved highly relevant in recent times in Australia. The relationship between integrity agencies and the government of the day has continued to be problematic in both national and state or territory jurisdictions.<sup>254</sup>

Antagonism between the Liberal and National parties, in particular, and human rights integrity agencies is not a new phenomenon, with migration policies often at the forefront of the battles between them. In 2006, John von Doussa, the then President of the Human Rights Commission, noted that on five occasions since 1997 the Commission had pointed out to government that its immigration detention regime breached standards set by the United Nations Human Rights Committee.<sup>255</sup> Prime Minister John Howard attempted to limit the Commission's remit but the bills to legalise this were defeated by the Senate in 1998 and 2003. In response, the Howard Government reduced the Commission's budget by 26 percent in 1999–2000, so that it was unable to properly fulfill its statutory obligations.

The Abbott Government, reacting to a later adverse report on prolonged immigration detention of children, sought to reduce the future budgets of the Australian Human Rights Commission (AHRC) and the Office of the Australian Information Commissioner (OAIC). In the case of the AHRC, its President raised concerns that budget cuts would ensure that the agency would be unable to fulfill its statutory obligations. For the OAIC, the Privacy Commissioner sought to minimise the effects of the budget cuts by relocating his office to his home. This created a strong response from some quarters, in particular from three former justices of the Victorian Supreme Court, who denounced the government's actions in an open letter to Fairfax press:

Having failed to pass the legislative amendments that would have affected its purpose, the government has achieved the same result by the power of

<sup>253</sup> I. Temby, 'Safeguarding Integrity in Government', *Papers on Parliament*. Canberra: Australian Senate, 21, pp. 1–10.

<sup>254</sup> Aulich, 'Autonomy and Control'; Chris Aulich, 'Integrity and Public Sector Governance: A Democratic Deficit?', in Chris Aulich (ed), *From Abbott to Turnbull: A New Direction?*. West Geelong: Echo Books, 2016.

<sup>255</sup> John von Doussa, 'In Defence of Human Rights'.

<https://www.humanrights.gov.au/news/speeches/defence-human-rights>

the purse. It has ignored the law but won a tactical victory. Expedience has again trumped principle.

Does [the government's] conduct involve both a denial that it, the executive branch of government, is subject to the laws made by the Parliament and also a claim that it can act to alter the operation of the laws of the Parliament without its consent. If so, does that constitute a failure to honour and so maintain two fundamental principles that underpin our constitution and our democracy—the rule of law and the separation of powers?<sup>256</sup>

Recommitting his government to its original election promise to 'restore accountability and improve transparency measures to be more accountable', incoming Prime Minister Turnbull abandoned the plans to abolish or defund the OAI and made provision in the next Budget to spend \$34 million to keep the Office open over the following four years. While this news was well received by many transparency advocates, it was difficult to restore the Office to its pre-2014 position given that it had lost a number of its key staff, and already had closed several of its offices.<sup>257</sup> This use of budget cuts to limit the capacity of integrity agencies was highly problematic in light of the Parliament's clear unwillingness to close the office.<sup>258</sup>

Such threatened and actual budget cuts have not been confined to the Commonwealth. The Victorian Auditor-General's position was compromised following his criticisms of the Kennett Government's management of private prisons and its use of tax-payer funded credit cards. The government responded by reducing the operating budget of the Auditor-General's office and by outsourcing a number of the functions traditionally undertaken by that office.<sup>259</sup> Similarly, in the Australian Capital Territory (ACT), the Chief Minister threatened the Auditor-General's future budget allocations after she had made an unfavourable report on the ACT ambulance service.<sup>260</sup>

Executives have sought other ways to exercise control over integrity agencies when blocked from using Parliament as its instrument. At Commonwealth level, these have included partisan appointments to the AHRC, including appointment of an official who previously worked for an organisation that had publicly advocated the AHRC's closure. Public comment from Prime Minister Tony Abbott and senior government ministers calling for the resignation of the President of the AHRC did little to engender public confidence in the agency. In one case, Abbott suggested that the Commission should be 'ashamed' for performing a 'blatantly partisan politicised exercise'. Along with the Attorney-General, he called for the President to resign by claiming that 'the political impartiality of the commission had been fatally compromised,' and that 'the government has lost confidence in the President of the Human Rights Commission'.<sup>261</sup>

These examples illustrate attempts by the executive to exercise tighter control over integrity agencies. Many observers, including the Australian division of the International Commission of Jurists, have condemned this as executive overreach, objecting to government action in seeking to achieve executively what it could not achieve legislatively with the effect of

<sup>256</sup> Smith et al., 'Abbott Government Shirts Parliament', *The Canberra Times*, 26 May 2015.

<sup>257</sup> 'Turnbull Stays Hand on OIC Chop, Keeps Reduced Functions', *The Mandarin*, 4 May 2016. <http://www.themandarin.com.au/101111-turnbull-stays-hand-on-oic-chop-keeps-reduced-functions/>

<sup>258</sup> Aulich, 'Autonomy and Control'; Aulich, 'Integrity and Public Sector Governance'.

<sup>259</sup> ABC Radio National, 'Victoria's Auditor-General Retires', July 29, 1999. <http://www.abc.net.au/pm/stories/s40069.htm>

<sup>260</sup> Aulich, 'Autonomy and Control'.

<sup>261</sup> Aulich, 'Integrity and Public Sector Governance'.

emasculating a statutory body.<sup>262</sup> Executive control has been increased through legislation, budget cuts, appointments (and delays in appointments), and public accusations about partisanship when agencies have made criticisms of government. All of these diminish confidence in integrity agencies and impose constraints on their capacity to hold governments to account. In short, they amount to a form of democratic deficit.

## Recognition as Officers of Parliament

It is from cases such as those noted above that the notion has emerged that the major integrity agencies should be recognised as ‘officers of parliament’, typically formed into an integrity branch to stand alongside the legislature, executive, and judiciary branches. New Zealand, which innovated in establishing the first ombudsman position in the Anglo-Saxon world in 1962 and produced the foundation director for Transparency International, pioneered again with respect to the establishment of an Officers of Parliament provision in the late 1980s. The Finance and Expenditure Committee of its Parliament gained acceptance of a process for formally defining a small number of integrity-type positions as officers of parliament, with a special Officers of Parliament Committee in the legislature to monitor the system.<sup>263</sup>

There has been a growing interest in this idea of an ‘integrity branch’ (often conceived of as a ‘fourth arm of government’) in other Westminster-style parliamentary systems.<sup>264</sup> The relationship of such integrity branches to the legislature is likely to be crucial to their effectiveness. They would be formally accountable direct to the Parliament rather than to the government of the day enabling further independence and providing some limits on executive overreach. Functions would include budget approval and performance oversight of integrity bodies and involve more transparent and independent processes for appointments that have for too long been the province of the executive arm of government. The branch would be chaired by the Parliamentary Speaker or Presiding Officer who, for this purpose, would have the status of a minister acting for these parts of the administrative system under his or her supervision.<sup>265</sup>

## Conclusion

For good governance we need strong integrity agencies with adequate resources to protect them in the performance of their duties. These resources must include the capacity to censure governments that seek to minimise agency effectiveness. But integrity agencies also need the support of other pillars of the integrity system, which includes executive government.

In the statutes that create agencies, executive governments and legislatures will together have laid down the necessary operating procedures, defined jurisdictions, and provided legal protections for the agency against political or bureaucratic interference, and no doubt also established some forms of accountability running back from the agency to themselves. They will frequently convince themselves that these are sufficient guarantees of effective autonomy. But other factors may well be present in the world of practical politics that

<sup>262</sup> Richard Mulgan, ‘The Slow Death of the Office of the Australian Information Commissioner’, *The Canberra Times*, 1 September 2015. Retrieved from <http://www.canberratimes>

<sup>263</sup> A. Beattie, ‘Officers of Parliament: The New Zealand Model’, *Australasian Parliamentary Review*, 21(1), 2006, pp. 143–156.

<sup>264</sup> Roger Wettenhall, ‘Integrity Agencies: The Significance of the Parliamentary Relationship’. *Policy Studies*, 33(1), 2012, pp. 65–78.

<sup>265</sup> For a detailed discussion of the ‘fourth arm of government’, see A.J. Brown, ‘The Integrity Branch: A “System”, an “Industry”, or a “Sensible” Emerging Fourth Arm of Government?’, in M. Groves (ed.), *Modern Administrative Law in Australia: Concepts and Context*. Cambridge: Cambridge University Press, 2014.

counter these effects, including political activity by the very same governments and legislatures that established the agencies in the first place.

This activity might relate to governments not providing sufficient funding to enable integrity agencies to discharge all their remits, or to the use of public criticism or threat of resource constraints to muzzle agencies that might be criticising government actions. Furthermore, all this may well be compounded by a condition not so infrequently encountered in the world of practical politics: the legislature may, itself, be in a very weak position in relation to the executive government so that it is unable to offer any of the expected protections.

Since integrity agencies have a vitally important role to play in the moral defences of our communities, their legal position needs to be constantly watched to ensure all available formal protections are available to them. But, of course they are insufficient by themselves to clear away the curse of corruption, to set ethical standards and to monitor the course of national integrity.

Essential requirements include quality interactions and connections with other parts of the public sector, including 'client' bodies that have recourse to their services or who are subject to their oversight, producing an enculturation or acceptance that develops over time. Moreover, such enculturation or acceptance will be dependent on the level of integrity found elsewhere in the civil service, as public integrity will always rely heavily on good integrity practices within all public bodies. The ultimate challenge for integrity agencies and their creators is to recognise that new accountability issues are constantly arising, and that good governance with integrity comes only when the political and administrative leadership provides unequivocal support to the integrity system and all its pillars, among which the integrity agencies claim a major place.

## Parliaments and Their Watchdogs: Evaluating the Role of Periodic Statutory Reviews of Auditors General

Peter Wilkins<sup>266</sup>

Adjunct Professor, John Curtin Institute of Public Policy, Curtin University

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*The Committee is always open to exploring way[s] of improving its strategic review function ... Perhaps most importantly Are strategic reviews meeting Parliaments' needs? What benefits are Auditor-Generals deriving from the strategic review process?*

Chair, Public Accounts and Estimates Committee, Parliament of Victoria<sup>267</sup>

### Introduction

Watchdogs such as the Auditor General and the Ombudsman are created by Parliaments to perform important integrity, accountability and oversight functions. To perform these functions effectively and to maintain trust in their roles they perform their functions independently of the Executive and of the Parliament itself. They are given extensive powers, broadly similar to those granted to Royal Commissions. The watchdogs assist Parliaments in holding Governments to account by the provision of information and they also provide services such as resolution of complaints about the actions of agencies of the Executive. These functions provide benefits to Parliament, the community, organisations and individuals.

Many Parliaments have included in legislation a requirement for one or more of their watchdogs to be subject to review at regular intervals. While higher purposes of the reviews are not embodied in the legislation, it is broadly evident that the reviews are intended to provide assurance on an ongoing basis that the institutions are performing to a high standard. For instance, the New South Wales Deputy Auditor General commented that statutory reviews '... are necessary and are fundamental for Parliament to gain assurance that the Auditor-General is carrying out his role in an appropriate way'.<sup>268</sup>

The benefits of having the reviews scheduled in advance through legislation is highlighted by the experience in the Australian Capital Territory (ACT). Prior to any statutory provision for a review, the Government had criticised the Auditor General and then initiated a performance audit of the Auditor General resulting in commentary that identified this as '... a thinly-veiled attempt to intimidate the Auditor-General'.<sup>269</sup>

However, periodic reviews are not a consistent practice across all Australian jurisdictions or across all watchdogs within particular jurisdictions. For instance, in Queensland both the Auditor General and the Ombudsman are subject to statutory 'Strategic Reviews'. The

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<sup>266</sup> Peter Wilkins was an Assistant Auditor General at the Western Australian Office of the Auditor General until early 2009, after which he served as Western Australian Deputy Ombudsman until early 2014.

<sup>267</sup> D. Pearson, Strategic Reviews of Auditors-General. Paper presented to the Australasian Council of Public Accounts Committees (ACPAC) 14th Biennial Conference, Brisbane, 20 April 2017.  
<http://www.acpac.asn.au/Conferences/2017/Strategic%20Reviews%20of%20Auditors-General%20-%20the%20Victorian%20Experience%20-%20Mr%20Danny%20Pearson%20MP%20-%20speech.pdf>

<sup>268</sup> T. Whitfield, 'Parliamentary Oversight: An Auditor-General's Perspective', *Australasian Parliamentary Review*, 21(1), 2006, pp. 88-93.

<sup>269</sup> V. Dunne, Strategic Review of Auditors-General. Paper presented to the Australasian Council of Public Accounts Committees (ACPAC) 14th Biennial Conference, Brisbane, 20 April 2017, p. 3.  
<http://www.acpac.asn.au/Conferences/2017/Strategic%20Reviews%20of%20Auditors-General%20-%20the%20ACT%20Experience%20-%20Mrs%20Vicki%20Dunne%20MLA.pdf>

Tasmanian Audit Office is subject to reviews of the efficiency, effectiveness and economy of its operations but there are no equivalent provisions for the Ombudsman. In South Australia, neither watchdog is subject to periodic statutory review.<sup>270</sup> The wide variation in review practices raises questions about the value of statutory reviews and whether different review approaches are suited to different contexts.

To date, there has not been a comparative analysis of such statutory reviews in Australia to understand what they address and the approaches to reviews that Parliaments might consider in future. This article starts to fill this gap by reporting an analysis of four Auditor General reviews. Periodic statutory reviews occur for Auditors General in most Australian jurisdictions and they therefore provide a basis for a comparative analysis of how these reviews are serving their respective Parliaments. The next sections present an overview of the four statutory reviews, including relevant aspects of legislation, followed by a comparative assessment of their terms of reference.<sup>271</sup>

## Overview of the Four Statutory Reviews

The four statutory reviews assessed in detail in this paper were selected to provide evidence of recent practice. They were the only such reviews released in 2016 and 2017. These reviews were conducted for the Auditors General of the Australian Capital Territory,<sup>272</sup> Queensland,<sup>273</sup> Victoria<sup>274</sup> and Western Australia.<sup>275</sup> Their key features are set out in Table 1.

The legislation establishes the nature of the review in each jurisdiction.<sup>276</sup> It also typically identifies the parliamentary committee that will have responsibility for the review, this being one of several roles of parliamentary oversight committees identified in their mandate to 'guard the guardians of integrity'.<sup>277</sup> It would be expected that reviews would differ between jurisdictions and between watchdog bodies within a jurisdiction. Comparisons between reviews need to allow for differences between the audit mandates and the nature of the public sectors and specific agencies being audited.

Table 1 indicates that somewhat different approaches are taken in each case. Most notably, while in three jurisdictions reviews are initiated by and reported to a parliamentary committee, in Queensland reviews are initiated by and reported to the Government. The latter approach includes consultation with a parliamentary committee and the Premier is required to table the

<sup>270</sup> P. Smith and G. Carpenter, Strategic Review of the Queensland Audit Office, March 2017.

<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T493.pdf>; H. Smerdon, Strategic Review of the Office of the Queensland Ombudsman, 2012.

<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2012/5412T110.pdf>

<sup>271</sup> An earlier draft of this paper was provided to the statutory reviewers in the four jurisdictions and their comments have helped to inform my analysis. Their contribution to improving the paper is gratefully acknowledged, as are the comments of the anonymous journal referee.

<sup>272</sup> D. Pearson, 2016 Strategic Review of the ACT Auditor-General.

<http://www.audit.act.gov.au/auditreports/Independent%20review%20of%20the%20office/2016%20Strategic%20Review%20of%20the%20ACT%20Auditor-General.pdf>

<sup>273</sup> Smith and Carpenter, Strategic Review of Queensland Audit Office.

<sup>274</sup> Deloitte, Performance Audit of the Victorian Auditor-General and the Victorian Auditor-General's Office, 2016.

[http://www.parliament.vic.gov.au/file\\_uploads/Performance\\_Audit\\_of\\_the\\_Victorian\\_Auditor-General\\_s\\_Office\\_00txBCvf.pdf](http://www.parliament.vic.gov.au/file_uploads/Performance_Audit_of_the_Victorian_Auditor-General_s_Office_00txBCvf.pdf)

<sup>275</sup> Vista Advisory, Statutory Review of the Performance of the Auditor General for Western Australia (the OAG Review). Final Report for the Joint Standing Committee on Audit, Parliament of Western Australia, 27 November 2015. Published as Appendix 1 in Western Australian Joint Standing Committee on Audit, Review of the Operation and Effectiveness of the Auditor General Act 2006, August 2016.

[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/990219A1B6E07E0B4825801A000DD7AB/\\$file/ac.rev.160825.rpf.007.xx.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/990219A1B6E07E0B4825801A000DD7AB/$file/ac.rev.160825.rpf.007.xx.pdf)

<sup>276</sup> Australian Capital Territory (ACT) Auditor-General Act 1996, Queensland (QLD) Auditor-General Act 2009, Victorian (Vic) Audit Act 1994, Western Australian (WA) Auditor General Act 2006.

<sup>277</sup> G. Griffith, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees', *Australasian Parliamentary Review*, 21(1), 2006, p. 19.

review report in Parliament; however, this represents a lower standard of independence for the review than is achieved by the legislation in the other three jurisdictions.

Somewhat different emphases in the nature of the reviews are also evident. The ACT and Victorian Acts specifically links the reviews to the concept of performance audits, while the ACT and Queensland Acts identify them as 'strategic reviews', with the ACT legislation defining a strategic review as a review of the Auditor General's functions and a performance audit of the Auditor General. The Western Australian legislation specifies that the review is to include both the performance of the Auditor General's functions and the operation and effectiveness of the Act, terming it a 'performance and legislative review'. This variation is consistent with an earlier nationwide assessment of reviews, which found that legislation identified three reviews as strategic, six as concerning effectiveness and efficiency, two or three as addressing the functions of the Auditor General and two as addressing compliance.<sup>278</sup> While none of the four statutes analysed here identify the higher purposes of the reviews, it can be inferred that the overall purpose of the reviews is to hold the Auditor General to account and to improve the performance of the Audit Office.

The terms of reference are set each time a review is commenced, so the scope of reviews differs over time. With the four recent reviews assessed here, the terms of reference have similarities:

- all address audit office effectiveness
- all have a focus on audit office accountability and transparency, included through aspects such as effectiveness of communication with stakeholders and measures of performance
- all have a focus on audit independence
- three have a focus on following up a previous review (ACT, Queensland and Victoria), with this not being applicable to the Western Australia, since its review was the first of its kind.

Issues specific to the context and timing of the review are also evident. For instance, the Western Australian review was required to address new powers '... to audit certain accounts of commercial activities of entities where they are carrying out the functions of an agency (follow the money audits)' and to identify 'any improvements that could be made to increase accountability of commercial entities and not-for-profit organisations that are receiving public funds for providing public services'.<sup>279</sup>

Notwithstanding such requirements to focus on specific issues, the eight common focal points apparent across the four reviews are effectiveness, compliance, processes and efficiency, accountability and transparency, resourcing, independence, legislation, and learning. These eight focal points serve the wider purpose of holding the Auditor General to account and helping to improve auditing performance. They apply to varying degrees to the various functions of the Auditor General. These functions primarily involve financial and performance auditing; however, legislation may require other associated functions. In Western Australia, for example, the functions include auditing of key performance indicators and decisions by Ministers to withhold information from Parliament. The next parts of this article examine four of the focal points identified above.

<sup>278</sup> P. Smith and G. Carpenter, Strategic Reviews of the Offices of Auditors-General: The Queensland Experience. Paper presented to the Australasian Council of Public Accounts Committees (ACPAC) 14th Biennial Conference, Brisbane, 20 April 2017.

<http://www.acpac.asn.au/Conferences/2017/Strategic%20Reviews%20of%20Auditors-General%20-%20the%20Queensland%20Experience%20-%20Ms%20Phillippa%20Smith%20and%20Mr%20Graham%20Carpenter.pdf>

<sup>279</sup> Vista Advisory, Statutory Review, p. 131.

**Table 1: Overview of Four Australian Statutory Reviews of Auditors General**

|  | ACT  | Queensland   | Victoria   | Western Australia   |
|--|--|--|--|---|
| <b>Type of Review</b>  | Strategic review that includes a review of functions and a performance audit   | Strategic review which includes a review of the functions and performance of the functions   | Performance audit to determine if the objectives are being achieved effectively, economically, efficiently (the 'three Es') and in compliance with the Act | Review of the operation and effectiveness of the Act and performance of functions     |
| <b>Statutory Basis</b>   | The Act sets out the functions that include promoting accountability of public administration  | The Act sets out the mandate but does not identify specific purposes   | The Act sets objectives including the 'three Es' of public sector operations and activities  | The Act sets out the functions but does not identify specific purposes                |
| <b>Terms of Reference</b>  |  |  |  |   |
| Audit office effectiveness: Improving public sector performance and accountability | Value for money of performance audit by improving public sector accountability; contribution to public sector performance through reference to effectiveness | Particular focus on the new performance audit mandate and effectiveness of recommendations; standard and quality of service provided to the Parliament | Conduct and management of performance audits. Contribution to public sector accountability not included  | Effectiveness of reports; a reasonable level of scrutiny; meeting Parliamentary needs |
| Accountability and transparency of the Audit Office                                | Effectiveness of communication with stakeholders   | Performance indicators to monitor Audit Office efficiency and effectiveness  | Monitoring and measuring Audit Office performance and effectiveness  | Effectiveness of communication with stakeholders                                      |
| Independence   | Whether legislation safeguards independence.   | By implication enables comment on independence.  | Not mentioned.   | Independence of the Auditor General is protected.                                     |
| Learning: Response to recommendations of previous reviews                          | Evaluate how well the recommendations of previous review have been implemented   | Consider previous review recommendations, Committee report and Government response   | Effectiveness of actions to address recommendations of previous review   | Not applicable (this is the first review)   |

A consideration of the *effectiveness* of Auditors General needs to be based on the purpose of public sector audit, which broadly stated is to improve public sector accountability and performance. Both the ACT and Western Australian reviews raised issues related to the performance audit function in the context of improving public sector accountability rather than public sector performance. For instance, the ACT review was asked to address whether performance audit provides value for money by improving public sector accountability; however, there was no specific reference to the contribution to public sector performance other than through the broad concept of effectiveness. This mirrors the ACT legislation that identifies a specific audit function of promoting accountability of public administration.

The Western Australian review was asked to address the effectiveness of reports, the level of scrutiny (including best practice topic selection) and value for money audits for the purpose of improving public accountability. The Victorian reviewer created an Audit Plan, as well as criteria to assess each of the points in the terms of reference, that were agreed by the parliamentary committee and the Audit Office. Unusually, the reviewer also established eight success factors for meeting the terms of reference, following discussions with other Auditors Generals and agreement by the parliamentary committee and the Audit Office. This provided a useful way for the review to address the large number of detailed terms of reference, which included 52 separate items.<sup>280</sup> The other three reviews examined for this article had counts ranging from 17 to 26 items.

Regarding the focus on audit office *accountability and transparency*, the Victorian terms of reference identified this in the context of monitoring and measuring Audit Office performance and effectiveness. This included consideration of the appropriateness and veracity of the performance indicators and benchmarks used and the usefulness of measures used to assess the impact of audit activities on operations and management practices across the public sector.

In relation to *audit independence*, the Queensland review was asked to note a recent parliamentary committee report on assuring the Auditor General's independence, which the reviewers interpreted as an invitation to comment on the matters that were the subject of the committee inquiry. The ACT review specifically raised the extent to which the Auditor General's legislative mandate strengthened and safeguarded independence. The Western Australian review was asked to venture further and comment on whether the independence of the Auditor General was protected with regard to legislative safeguards, on how those legislative safeguards for independence had operated in practice and on the strength of internal Audit Office safeguards of independence.<sup>281</sup>

In relation to *learning*, in all cases where it was applicable, the reviews were asked to address responses to previous reviews. This was in itself informative but it also provided an indication of the likelihood of follow through on the accepted recommendations from the current review. As might be expected, all the reviews found that the audit offices had a strong culture of taking action in response to review recommendations. It was also evident that the audit offices responded to draft material provided prior to the finalisation of the review report and provided reasons for any recommendations that were not accepted fully. For instance, the ACT review made recommendations which addressed legislative arrangements, audit planning issues, financial and performance audit processes, resourcing, and stakeholder engagement. Most were agreed to in full by the Auditor General, several were agreed to in part or in principle and, where applicable, explanations were provided. While not commenting directly on whether it was likely they would be implemented appropriately, the review observed that most recommendations from the previous audit had been acted on in an appropriate manner.<sup>282</sup>

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<sup>280</sup> Deloitte, Performance Audit, p. 44.

<sup>281</sup> Smith and Carpenter, Strategic Review of Queensland Audit Office, p. 132.

<sup>282</sup> Pearson, 2016 Strategic Review.

## Discussion

This section considers whether reviews are needed and whether too much is being asked of them. It also addresses issues relating to the selection of the reviewers, the role of standards for the reviews, the expectation of continuous improvement, how best to hold Auditors General to account and help improve their performance, and the application of the review lessons to oversight of other watchdog bodies.

### *Are periodic reviews needed?*

The first issue to come out of the exploratory analysis above is whether such periodic reviews are needed at all. Based on the existence of the statutory provisions it is evident that they have been sought by parliaments for Auditors General at least. It is of note that the assessment of the content of the four periodic statutory reviews of Auditors General identified a prevailing view that parliaments are generally well served by their Auditors General.<sup>283</sup> This is closely related to the use that parliamentary committees and Members of Parliament make of the work of the Auditors General. For instance, the Western Australian review identified a briefing provided to interested Members of Parliament and committee staff on a report, a question asked of the Minister in Parliamentary Question Time, advice provided by the Minister in response and media reporting. The Public Accounts Committee also conducted follow-up reviews of the Auditor General's reports to hold agencies accountable for implementation of report recommendations. The Committee indicated that the process helped '...Parliament measure the effectiveness of the Auditor General's work and provide insight into the impact of that work on the public sector'.<sup>284</sup> The Queensland review similarly commented on the Queensland Parliament's use of performance audit reports and made a recommendation that the Audit Office continue to work with the Parliament to find ways to improve its communication and engagement with Members of Parliament on its performance audit reports.<sup>285</sup>

It remains unclear why periodic reviews are needed for Auditors General if they are not needed for similar watchdogs. In considering future role of reviews, parliaments need to have a clear view of their purpose and to conduct regular reviews to determine whether the benefits of the reviews justify the costs and time involved. The purpose may be to hold the watchdogs to account, to help them improve their performance, or a mix of these two goals. Parliaments also need to be alert to unintended consequences, including impinging on the independence of the watchdogs involved. Griffith argues that integrity agencies need to be both independent and accountable.<sup>286</sup> They are independent of the Parliament that created them and yet accountable to it, and the relationship can be understood by regarding them as satellites of Parliament.<sup>287</sup>

The reviews need to be implemented with care, so that they balance respect for the watchdog's independence with the need for it to be accountable to the body that initiated its responsibilities and powers. Griffith notes that tensions can sometimes appear when the Public Accounts Committee '...assert[s] a more hierarchical, oversight stance towards the Auditor-General'.<sup>288</sup> He argues that an effective parliamentary oversight committee should include an ability to function independently of both the government and the agency it oversees,

<sup>283</sup> See also P. Wilkins, 'Watching the Watchdogs: Periodic Statutory Reviews of Audit Offices', in D. Gilchrist and R. Pilcher (eds.), *Accounting, Governance and Accountability in the Australian Public Sector*. Abingdon: Routledge, in press (2018).

<sup>284</sup> Vista Advisory, *Statutory Review*, p. 73.

<sup>285</sup> Smith and Carpenter, *Strategic Review of Queensland Audit Office*.

<sup>286</sup> Griffith, 'Parliament and Accountability'.

<sup>287</sup> P. Wilkins, 'Watchdogs as Satellites of Parliament', *Australian Journal of Public Administration*, 75(1), 2015, pp. 8-27.

<sup>288</sup> Griffith, 'Parliament and Accountability', p. 23.

have appropriate powers to call for and examine witnesses and papers, and have access to the information needed to render the agency accountable.<sup>289</sup>

### *Asking too much?*

While there is continuing support for the reviews by parliamentary committees and Auditors General, Parliaments need to consider whether they are asking too much of individual reviews. For instance, the lead Queensland reviewer commented in evidence following completion of the report that, in effect, the reviewers were carrying out four reviews, these being into legislation, efficiency, effectiveness and independence. The reviewer made clear that this issue arose from the wording of the Queensland legislation. She went on to explain that, given the breadth of the review, there was an issue that would have been worthy of reporting on that was not addressed, namely ‘... whether the Auditor-General should audit not only financial reporting but also reporting of non-financial performance information’.<sup>290</sup> The reviewer indicated that she had considered the question and decided that it was not something that she would recommend or comment on in the report as it was probably too soon for the Auditor General to be involved.<sup>291</sup>

When commissioning reviews, parliamentary committees therefore also need to consider the nature and number of terms of reference. While prescribing more matters that should be covered there is a risk of having many matters treated at a high level and key issues that warrant detailed attention not receiving the attention they deserve. Potentially, the terms of reference could always focus on effectiveness and include a selection of the seven other focal points in the typology outlined earlier in this article, depending on the circumstances at the time. Giving reviewers a degree of discretion to focus on specific issues within a broadly defined purpose would mirror the approach adopted by Auditors General in the selection, scoping and conduct of performance audits. Review effort could then be focussed on the basis of considerations such as risk, materiality and significance to the Parliament and community.

### *Selection of reviewers*

Parliamentary committees also need to consider carefully the interaction of the terms of reference with the skills and methods of the reviewer. Different reviewers bring varying strengths in terms of strategic perspectives, process improvement, compliance and drawing on the views of stakeholders. For these reasons, there may be merit in appointing a team of reviewers and supporting the reviewers by others with additional skills as required.

Committees appear to adopt different approaches to selecting reviewers. For instance, the Chair of the ACT Standing Committee on Public Accounts indicated that the reviewer was selected through a request for expressions of interest from a short list of recently retired Auditors General,<sup>292</sup> whereas Western Australia used a consultancy to conduct its performance review through a formal tender process, indicating that this was to ensure value for money, transparency and accountability.<sup>293</sup> Given the variety of options available, it would be good practice always to explain the reasons for the approach adopted. A strategic

<sup>289</sup> Griffith, ‘Parliament and Accountability’.

<sup>290</sup> Queensland Finance and Administration Committee (QFAC), Public Briefing—Strategic Review of the Queensland Audit Office. Transcript of Proceedings, Brisbane, Wednesday 19 April 2017, p. 2.  
<http://www.parliament.qld.gov.au/documents/committees/FAC/2017/QAOStrategicReview/trns-pb-19Apr2017.pdf>

<sup>291</sup> QFAC, Public Briefing Transcript, Wednesday 19 April 2017.

<sup>292</sup> Dunne, Strategic Review of Auditors-General.

<sup>293</sup> Western Australian Joint Standing Committee on Audit (WAJSCA), Review of the Auditor General Act 2006—Appointment of Reviewer, May 2015.  
[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/EE0AB5B7D69C22F848257E3C002A74DD/\\$file/ac.rev.150505.rpf.003.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/EE0AB5B7D69C22F848257E3C002A74DD/$file/ac.rev.150505.rpf.003.pdf)

approach would also see committees, or the Parliament as a whole, indicate its expectations of reviewers across a sequence of reviews.

### *Review standards*

Committees should provide clear guidance on the standards they are expecting of the review in the terms of reference and should assess compliance with these standards. Guidance was not provided for three jurisdictions, whereas the ACT terms of reference were more specific, indicating that they were seeking an independent opinion.<sup>294</sup> They also specified that the review was to be conducted in accordance with the requirements of the Act and 'relevant professional auditing and accounting standards; and professional statements and related guidance'.<sup>295</sup> In contrast, while the legislation calls for a performance audit, the Victorian review described itself as advisory in nature and indicated that it was not '... conducted in accordance with the standards issued by the Australian Auditing and Assurance Standards Board and consequently no opinions or conclusions under these standards [were] expressed'.<sup>296</sup>

### *Continuous improvement*

Parliaments should routinely be considering any gaps in the coverage or approach of their reviews. For instance, none of the four reviews commented directly of the important consideration that Parliamentary oversight should preserve and not in any way compromise the independence of the Auditor General.<sup>297</sup>

Parliaments should also learn directly from reviews in other jurisdictions. For instance, the Western Australian review raised the concept of a Whole-of-Government Audit Committee to follow-up implementation of unassigned and cross-agency recommendations. Other Parliaments could consider this innovative proposal without waiting for the possibility it is raised in their next review.

One little recognised benefit of the reviews is the potential to gather and analyse the views of stakeholders, with the potential that some public sector staff and other stakeholders may be more forthright in their views than they would be in speaking with audit office staff, survey companies working on the auditor's behalf, or when providing comments directly to a parliamentary committee.

At the outset, parliamentary committees should be considering the role they intend to play once they have received a review report. Practices seem to vary widely, with there being no evident follow-up of the Victorian review report (other than might be expected as part of the next periodic review). The Western Australian Committee briefly summarised the content of the report by the contracted reviewer Vista Advisory and made a finding endorsing the overall assessment. It did not work through the performance issues raised, although it did draw on some of the review comments in considering the operation and effectiveness of the Act.<sup>298</sup> The Queensland Committee has held hearings both with the reviewers and the Auditor General and made the transcripts available publicly.<sup>299</sup> The most detailed follow-up has been

<sup>294</sup> Pearson, 2016 Strategic Review, p. 56.

<sup>295</sup> Pearson, 2016 Strategic Review, p. 58.

<sup>296</sup> Deloitte, Performance Audit, p. 4.

<sup>297</sup> See also Whitfield, 'Parliamentary Oversight'.

<sup>298</sup> WAJSCA, Review of the Operation and Effectiveness of the Auditor General Act 2006, August 2016.

[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/990219A1B6E07E0B4825801A000DD7AB/\\$file/ac.rev.160825.rpf.007.xx.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/990219A1B6E07E0B4825801A000DD7AB/$file/ac.rev.160825.rpf.007.xx.pdf)

<sup>299</sup> QFAC, Public Briefing, Wednesday 19 April 2017; QFAC, Public Briefing—Strategic Review of the Queensland Audit Office. Transcript of Proceedings, Brisbane, Wednesday 19 April 2017.

<http://www.parliament.qld.gov.au/documents/committees/FAC/2017/QAOStrategicReview/trns-pb-19Apr2017.pdf>

by two ACT committees. One made recommendations that included the term of appointment of the Auditor General, a requirement that audited agencies provide a substantial response to audit findings and recommendations for inclusion in performance audit reports, and a funding model to support growth in the performance audit program.<sup>300</sup> The Government responded that of the six committee recommendations, it agreed to two in full, agreed in principle to one, and noted the three others.<sup>301</sup> The other committee made recommendations regarding support to the Speaker in the exercise of the Speaker's functions in relation to Officers of the Legislative Assembly, including in their budget appropriations.<sup>302</sup>

### *How to best hold Auditors General to account and help improve their performance*

The benefits delivered by the reviews need to be viewed alongside the costs involved. The direct cost of the reviews is significant; for instance, the contracted cost of the Western Australian performance review was approximately \$330,000,<sup>303</sup> to which could be added the cost of the time of the audit office, Parliament and stakeholders. Potentially linked to a consideration of the cost of reviews is the interval between reviews. The Western Australian parliamentary committee considered this and confirmed its view of the appropriateness of the five-year interval in that State between performance reviews, noting there are other intervals in other jurisdictions. It also considered that these reviews should be linked to the term of appointment of an Auditor General, recommending they occur in the second and seventh years of an Auditor General's ten-year contract.<sup>304</sup>

This in turn raises questions about the most appropriate approach to the reviews in different contexts. Options that have been identified include independent review and publication of review reports and reviewers appointed by parliamentary committees to assess effectiveness, review the Auditor General's functions and consider any other strategic issues relevant at the time of the review. There are other possible ways of assessing efficiency and compliance; for example, *ad hoc* reviews by an office's independent auditor or by another independent assessor.<sup>305</sup>

More generally, it is worth considering whether periodic reviews are the best option compared with a standing review function. Performance audit is based on risk-based coverage rather than scheduled audits at specified intervals, so this approach could be seen as equally applicable to the oversight of audit offices.<sup>306</sup>

The Chair of the Victorian Public Accounts and Estimates Committee has queried whether having separate appointments for the financial and performance audits of audit offices is preferable to the dual role through a single appointment, as is the case for the Australian National Audit Office. He also questioned whether the performance audit should include a legislative review or be separate from it.<sup>307</sup>

<sup>300</sup> ACT Standing Committee on Public Accounts, Inquiry into 2016 Strategic Review of the ACT Auditor-General – Recommendations of Report, 2016.

[http://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0020/910055/8th-PAC-29.pdf](http://www.parliament.act.gov.au/_data/assets/pdf_file/0020/910055/8th-PAC-29.pdf)

<sup>301</sup> ACT Government, Government Response to the Standing Committee on Public Accounts Report 29/2016: Inquiry into 2016 Strategic Review of the ACT Auditor-General – Recommendations of Report, 2016.

[http://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0009/913914/8th-PAC-29-Strategic-Review-of-AG.pdf](http://www.parliament.act.gov.au/_data/assets/pdf_file/0009/913914/8th-PAC-29-Strategic-Review-of-AG.pdf)

<sup>302</sup> ACT Standing Committee on Administration and Procedure, Inquiry into Provisions of the Legislative Assembly (Office of the Legislative Assembly) Act, 2016. [http://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0019/912511/Report-Inquiry-into-Provisions-of-the-Legislative-Assembly-Office-of-the-Legislative-Assembly-Act-2012.pdf](http://www.parliament.act.gov.au/_data/assets/pdf_file/0019/912511/Report-Inquiry-into-Provisions-of-the-Legislative-Assembly-Office-of-the-Legislative-Assembly-Act-2012.pdf)

<sup>303</sup> WAJSCA, Review of the Auditor General Act 2006—Appointment of Reviewer.

<sup>304</sup> WAJSCA, Review of the Operation and Effectiveness of Auditor General Act 2006.

<sup>305</sup> Smith and Carpenter, Strategic Reviews of Auditors-General.

<sup>306</sup> See, for example, Independent Auditor, Review of Communications Processes: Australian National Audit Office, 2015. [https://www.anao.gov.au/sites/g/files/net616/f/ANAO-External\\_Audit\\_Review\\_of\\_Communication\\_Processes.pdf](https://www.anao.gov.au/sites/g/files/net616/f/ANAO-External_Audit_Review_of_Communication_Processes.pdf)

<sup>307</sup> Pearson, Strategic Reviews of Auditors-General, p. 3.

### *Application to other watchdogs*

In considering whether the observations based on the four recent audit reviews have application to other watchdogs, there are reasons to favour consistency across watchdogs and other reasons to favour adopting quite different approaches between watchdog types. Queensland, which is the one jurisdiction that has periodic statutory reviews of both its Auditor General and Ombudsman, has defined both of these as strategic reviews. The most recent review of the Ombudsman, which made 57 recommendations, has broad similarities with the more recent review of the Auditor General.<sup>308</sup> The report into the Ombudsman was assessed by a parliamentary committee, which provided comments on 24 of the reviewer's recommendations, including detailed comments on proposed amendments to the *Ombudsman Act 2001*.<sup>309</sup>

Reasons that can be posited for different treatment of watchdogs include the differences between the watchdog roles. While it is difficult to define precisely the watchdogs that could be covered by such reviews, the designation 'Officer of Parliament' provides an initial guide. In at least one jurisdiction in Australia, these are the Auditor General, Ombudsman, Electoral Commissioner, Integrity Commissioner, Information Commissioner, an anti-corruption agency and an anti-corruption oversight agency.<sup>310</sup> It is evident from this list that there are diverse functions involved. Not all have a primary role of supporting Parliament in its role of holding Government to account. It is also evident that, in relation to anti-corruption agencies, in some jurisdictions there is another 'Officer of Parliament' to oversee their work. More generally, it has been observed that there is a web of oversight relationships between watchdogs.<sup>311</sup> In the Western Australian context this includes:

- the Auditor General audits all the other watchdogs and the office is itself audited independently
- the Ombudsman has coverage over the Public Sector Commission (PSC), Auditor General and Commissioner for Children and Young People (CCYP) in relation to their functions as CEO or Chief Employee;
- the Information Commissioner has coverage over the PSC and CCYP;
- the PSC can undertake reviews or special inquiries of all the watchdogs or their offices;
- the Corruption and Crime Commission (CCC) has standard oversight roles other than for the Parliamentary Inspector of the CCC and itself; and
- the Parliamentary Inspector of the CCC has coverage over the CCC.<sup>312</sup>

This web of oversight is not in general based on periodic as distinct from 'when needed' reviews. The notable exception is the annual financial audit role of Auditors General. Perhaps it is this tradition that has influenced the view that the Auditor General should be subject to periodic review.

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<sup>308</sup> Smerdon, Strategic Review.

<sup>309</sup> Queensland Legal Affairs and Community Safety Committee, Report on the Strategic Review of the Office of the Queensland Ombudsman, 2012. <http://www.parliament.qld.gov.au/documents/committees/LACSC/2012/StrategicReviewOmbudsman/121122-rpt-15.pdf>

<sup>310</sup> Wilkins, 'Watchdogs as Satellites'.

<sup>311</sup> W. Martin, Forewarned and Four-Armed—Administrative Law Values and the Fourth Arm of Government. Whitmore Lecture, Sydney, 1 August 2013. <http://www.supremecourt.wa.gov.au/files/Whitmore%20Lecture%202013%20Chief%20Justice%20Martin%201%20Aug%202013.pdf>

<sup>312</sup> P. Wilkins, J. Phillimore and D. Gilchrist, Collaboration between Watchdogs: Learnings from the Western Australian Experience, November 2015. <http://www.curtin.edu.au/research/icipp/local/docs/master-collaboration-between-watchdogs-report-nov-2015.pdf>

The eightfold typology developed in this article from the four recent audit reviews could be used when considering the best approach for individual watchdogs. The purpose and areas of focus are broadly applicable across a range of watchdogs, as they represent aspects of good governance applicable to a broad range of independent accountability agencies. However, variations would be required to accommodate the different functions involved. For instance, for an Ombudsman the functions would include complaint resolution and own-motion investigations in place of the common audit functions of financial and performance auditing.

Options other than periodic reviews, including the approach of having a standing reviewer or performance auditor have the advantages of targeting review resources to the areas of greatest need. If more than one watchdog is involved, this increases the likelihood of transferring lessons learnt between watchdogs. It would be likely that subject area expertise would need to be accessed; however, this approach would have the benefit of sharing lessons learned and better practices across watchdogs.

Similarly, Parliament could have one committee to which the reviewer or performance auditor would report. This committee could also usefully have the role of appointments and setting of budgets. This approach would not restrict the provision of individual watchdog reports to the most relevant committee, this potentially including a mix of subject-area, public accounts and anti-corruption committees.

However, the differences between the functions tend to mitigate against centralisation and consistency of approach, and each case needs to be considered on its merits, taking particular account of the jurisdictional context. To this end, it would be timely for each Parliament to review the potential for greater centralisation and consistency in relation to periodic reviews across all its watchdog bodies.

## Conclusion

The assessment of the four periodic statutory reviews of Auditors General has identified a typology for such reviews that enables comparative analysis. It has also helped inform consideration of the reviews of a wider range of watchdogs. It might even assist in reviews of parliamentary oversight committees, since it can be difficult for these committees to judge their own value and effectiveness. This could be addressed through periodic reviews of the costs and benefits of their reports and work by an external body.<sup>313</sup>

While there is widespread support for some kind of parliamentary oversight of watchdogs, there is a need to consider at intervals whether periodic reviews are providing value-for-money and whether there would be greater benefit in adopting other approaches. Decisions in this regard should take account of the perspectives of Members of Parliament, watchdogs and other stakeholders to ensure that the dual purposes of accountability and improvement are being enhanced.

Specific issues that warrant consideration include:

- regular review of the purposes, benefits and costs of periodic statutory reviews
- terms of reference that balance breadth and depth, consistent with the intended purposes of the review
- a strategic approach across a sequence of reviews
- an explanation of the selection of reviewers
- provision of guidance on, and assessments of compliance with, review standards

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<sup>313</sup> P. Pearce, 'Parliamentary Oversight from Parliament's Perspective: The NSW Parliamentary Committee on ICAC', *Australasian Parliamentary Review*, 21(1), 2006, pp. 95-101.

- consideration of the role to be played by the committee from the outset of each review
- adoption of an approach suited to the context, including the choice between periodic reviews and *ad hoc* reviews by an independent auditor
- review the potential for greater centralisation and consistency in relation to periodic reviews across all watchdogs.

The last point has been taken up in a recent Victorian Parliamentary Research Paper on the independence of Parliament, which made a number of observations applicable uniformly to all the Independent Officers of Parliament. This Paper did not consider the role of periodic statutory reviews in particular, but it noted the accountability arrangements in place for each of the five Victorian Independent Officers.<sup>314</sup> Three of Victoria's watchdogs have also recently called for consistent approaches to their oversight and accountability, with arrangements that '... reflect their status as independent officers of the Parliament and emphasise accountability directly to the Parliament. Oversight arrangements should be efficient, effective and proportionate to the risk the offices present'.<sup>315</sup> These developments suggest that there may at least be an appetite for increased consistency across statutory reviews of watchdogs in those jurisdictions where parliaments take a collective view of their Officers of Parliament.

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<sup>314</sup> J. Breukel, I. Dosen, C. Grover, B. Lesman, C. Macvean and H. Rosolen, Independence of Parliament. Research Paper No. 3, Parliamentary Library & Information Service, Department of Parliamentary Services Parliament of Victoria, 2017.

<http://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13807-independence-of-parliament>

<sup>315</sup> Victorian Auditor-General, Ombudsman and IBAC, Joint submission from the Auditor-General, the Victorian Ombudsman and IBAC, 20 May 2016, p. 2.

[http://www.dpc.vic.gov.au/images/documents/Community\\_Consultations/Joint\\_submission\\_from\\_IBAC\\_Auditor-General\\_and\\_Ombudsman.PDF](http://www.dpc.vic.gov.au/images/documents/Community_Consultations/Joint_submission_from_IBAC_Auditor-General_and_Ombudsman.PDF)

## Book Review

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**John Curtin's War, Volume One: the coming of war in the Pacific and reinventing Australia by John Edwards. Penguin Viking, 2018, 538 pp, RRP \$50.00.**

**David Clune**

Honorary Associate in the Department of Government and International Relations, University of Sydney

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When lists of Australia's greatest Prime Ministers are compiled, John Curtin is invariably at or near the top. He is something of a sentimental favourite: the man who waged a continuous, painful struggle against his personal demons; the physically and temperamentally ill-equipped wartime leader who triumphed against expectations; the tragic hero who died on the eve of victory.

There have been two previous biographies of Curtin, neither completely satisfactory. Lloyd Ross' 1977 book was a welcome start, but no more than that - certainly not in the same class as LF Crisp's *Ben Chifley*. In 1999, David Day published a lengthy biography of Curtin. Day is a capable historian and indefatigable researcher who falls down in one area: readability. He compulsively and indiscriminately piles up every fact he uncovers, ultimately to stultifying effect.

On the evidence of John Edwards' first volume, Curtin may have at last received the biography he deserves. Certainly, Edwards wins in the good read stakes. He is an elegant stylist, adept at providing context and personal detail without letting it take control of the narrative. It is easy to become absorbed in this book, effortlessly turning page after page. The axis Edwards uses to tell Curtin's story is that of Australia's role in the Second World War and the dramatic changes to national security and identity that ensued. He skillfully interweaves an account of Australia's time of greatest peril with Curtin's finest hour.

Wisely, Edwards includes no more than the necessary minimum about Curtin's early life, knowing this has already been covered exhaustively. He does, however, deftly sketch in the character of the man: normal, pleasant and popular but an alcoholic who suffered from depression; someone given to frenetic bursts of energy alternating with nervous and physical collapses; a compelling orator who was often shy and reserved in person. Above all, a man of sincerity, intellect, determination and vision. It was this that drove Curtin to undertake challenges that he knew would take a punishing toll on his fragile constitution. Yet, as Edwards also reveals, Curtin was not lacking in ambition and political guile.

Curtin had an impoverished upbringing, his family's struggle to survive being all too typical of the decades after the depression of the 1890s. He showed no great academic promise, but in Melbourne's socialist movement discovered a cause that gave direction to his life. It provided him with contacts, confidence, community, and ultimately a wife.

In 1911, Curtin became Secretary of the Victorian Timber Workers' Union. In the First World War he was a radical anti-conscriptionist and was briefly gaoled as a result. Curtin moved to Perth in 1917 to become editor of the *Westralian Worker*. It was a life-changing move: he temporarily dried out, married and started a family, and was elected Federal ALP Member for Fremantle in 1928.

As a backbencher, Curtin endured the harrowing Depression years when the Scullin Government tore itself apart. He lost his seat in the anti-Labor landslide of 1931 but regained

it three years later. In October 1935 an exhausted Jim Scullin resigned as Opposition Leader. Although Frank Forde was the front-runner to succeed him, Curtin was a respected veteran who had a serious claim. As Edwards notes, he was 'known as an occasional drunk, but also a powerful speaker, with a mind that could grapple with difficult questions of economics and public finance' (p. 61). After quiet background canvassing, Curtin defeated a complacent Forde by 11 votes to ten.

As Opposition Leader, Curtin showed tenacity in defeating Jack Lang and restoring unity to the fissiparous NSW Branch, for so long a liability. He showed personal courage in giving up alcohol. Curtin's attention turned increasingly to foreign affairs and defence as the international situation deteriorated. Presciently, he questioned whether Britain would be able to send a fleet to Singapore, the cornerstone of Australia's defence strategy, if it was fighting a two-front war.

Gradually rebuilding Labor's strength, Curtin won an equal number of seats to the Government at the 1940 election. The Coalition maintained a fragile hold on power with the support of two Independent MPs. On 7 October 1941, Curtin became Prime Minister when they transferred their allegiance to Labor. Two months later, war with Japan broke out. Within three months, the Japanese had rolled up resistance in the Pacific. Australia was virtually defenceless and in mortal danger.

Edwards points out that the Pacific war placed huge demands on Curtin: 'As the leader of a small, imperilled nation at war with a much larger power, as the leader of a dominion in the British Empire, he must exert utmost political skill, the most delicate and the most brutal of pressures, to exercise what little influence he could to protect his country and create for it the most congenial place in the post-war world' (p. 329). Nothing 'had or could have adequately prepared Curtin for leading Australia in time of peril'. Yet he 'accepted the vast responsibilities without bother or complaint'. In fact, he seemed to be 'rather more comfortable, easy and clear-headed in making big decisions than in making smaller ones' (p. 325).

The first volume of *John Curtin's War* concludes with Curtin's rightly lauded but much misunderstood 'Australia looks to America' statement which Edwards places in its true context, and the return of the 7<sup>th</sup> Division to Australia, 'the most memorable military choice Curtin made in the Pacific war' (p405). Edwards says of the situation in March 1942: 'The Americans were coming. So were the Japanese' (p. 452).

There are blemishes in Edwards' account; for example, in his version of events in the NSW Labor Party in 1939 (pp. 164-5). The Federal Executive did not set up a provisional NSW Executive in May 1939 as stated. Bill McKell and Bob Heffron were not allies, but rivals to succeed Lang. They were not supported by an 'anti-Lang and left-wing group of union officials'. The opposition to Lang consisted of two groups: the radical left and Communists, and an anti-Lang and anti-Communist group of union officials which supported McKell. When the former group took control of the NSW Branch, the increasingly obvious Communist influence was an embarrassment to Curtin. Edwards does not mention that, as a result, the Federal Party again intervened in NSW in August 1940 to put McKell's supporters in charge. This largely defused the issue in the September Federal election when Labor made vital gains in NSW.

Surprisingly, Edwards does not mention John Hirst's provocative, negative reassessment of Curtin, 'Was Curtin the best Prime Minister?' (*Looking for Australia*, Black Inc, 2010). Perhaps, however, this is to come in the final volume. All the more reason to look forward to it.